Office Supreme Court, U.S.
FILED
SEP 27 1983
ALEXANDER L. STEVAS,
CLERK

83-529

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether law enforcement officers may temporarily detain an individual reasonably suspected of criminal activity for the period—brief, but exceeding a few minutes—reasonably necessary to pursue a circumscribed investigation of the suspected criminal activity.

2. Whether, assuming that the initial phase of either respondent's detention was unduly extended, the illegality mandates suppression of a large shipment of marijuana which, because of its distinct odor, was discovered immediately thereafter in respondent Savage's vehicle.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals subsequent to this Court's remand (App. A, *infra*, 1a-13a) is reported at 712 F.2d 65.[1] The earlier opinion of the court of appeals (App. B, *infra*, 14a-51a) is reported

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[1] This Court's order granting our prior petition for a writ of certiorari, vacating the prior judgments of the court of appeals, and remanding the case to the court of appeals is reported at 457 U.S. 1127.

at 660 F.2d at 967.[2] The district court issued no written opinion.

JURISDICTION

The judgments of the court of appeals (App. C, *infra*, 52a and 53a) on remand from this Court were entered on June 30, 1983. On August 22, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of South Carolina, respondents were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Respondent Savage was sentenced to eight years' imprisonment, to be followed by a ten-year special parole term. Respondent Sharpe was sentenced to five years' imprisonment to be followed by a ten-year special parole term. A divided panel of the court of appeals reversed respondents' convictions. On our petition for a writ of certiorari (No. 81-1736), the judgment of the court of appeals was vacated and the case remanded for further consideration. 457 U.S. 1127. Upon remand the court of ap-

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[2] As explained below (page 10, *infra*), upon remand from this Court the court of appeals simply deleted certain portions of its original opinion and readopted the balance. It is that disposition that is set forth in the opinion after remand reproduced in App. A, *infra*. For the convenience of the Court, in reproducing the original opinion of the court of appeals in App. B, *infra*, we have placed the passages subsequently deleted in brackets.

peals, again divided, modified its opinion, but once again reversed respondents' convictions.

1. Prior to trial, respondents moved to suppress a large shipment of marijuana found in bales seized from a pickup truck that had been operated by respondent Savage. The evidence at a suppression hearing consolidated with the bench trial showed that, on the morning of June 9, 1978, DEA Agent Luther Cooke was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina, an area under surveillance by law enforcement authorities for suspected drug trafficking (I Tr. 35-36). At approximately 6:30 a.m., Agent Cooke noticed a blue pickup truck outfitted with a camper shell travelling in tandem with a blue Pontiac. It was later ascertained that the pickup truck was operated by respondent Savage and that the Pontiac (which also contained a male passenger) was operated by respondent Sharpe. Cooke noticed that the pickup truck was riding low in the rear and appeared overloaded; in addition, the rear window of the camper appeared to be covered with a quilted material (I Tr. 39-41). As he followed the pickup, the agent also observed that when the truck hit a bump or turned a corner it did not bounce or sway, a further indication that it was carrying a heavy load. Cooke drove along behind the two vehicles for approximately 21 miles. When the respondents reached the vicinity of Myrtle Beach, South Carolina, Agent Cooke radioed the State Highway Patrol for assistance (I Tr. 44-46).

Officer Kenneth Thrasher, in a marked patrol car, responded to Cooke's request for assistance. After Thrasher caught up with Cooke, the two officers, in their separate vehicles, followed respondents as the Pontiac and pickup truck turned onto a side road that

ran through a campground and looped back to the highway. Although the speed limit on the road was 35 miles per hour, respondents drove their vehicles at 50 to 60 miles per hour in an apparent attempt to elude the officers (I Tr. 50-52, 142-144; App. B, *infra*, 15a-16a). After completing this fruitless detour the Pontiac and the pickup truck returned to the six-lane highway and continued to proceed in a southerly direction in the center lane. The officers maintained their pursuit. Agent Cooke asked Officer Thrasher to signal both vehicles to stop. Thrasher pulled into the left lane alongside the Pontiac, the lead vehicle, and signaled the driver, respondent Sharpe, to pull over. As Sharpe moved his car into the right lane in compliance with this direction, the pickup truck, driven by respondent Savage, cut between the Pontiac and Thrasher's patrol car, nearly hitting the patrol car, and continued off down the highway (I Tr. 53-54, 144-145).

Officer Thrasher pursued the pickup, while DEA Agent Cooke pulled up behind the Pontiac, which had come to a stop, approached its occupants, and requested identification from respondent Sharpe and his companion. Sharpe produced a Georgia driver's license bearing the name Raymond J. Pavlovich (I Tr. 54). Cooke then attempted for several minutes to radio Thrasher to determine whether he had succeeded in stopping the pickup, but he was unable to make contact, apparently because Thrasher was not in his patrol car. Approximately 10 to 15 minutes after the initial stop of the Pontiac, two local Myrtle Beach policemen arrived at the location of that stop to remain with Sharpe and his companion while Cooke left to locate Officer Thrasher and the pickup (I Tr. 54-57, 100-101).

Meanwhile, Officer Thrasher had succeeded in stopping respondent Savage's pickup truck approximately a half-mile down the highway. As Thrasher got out of his patrol car with his revolver drawn, Savage stepped out of the truck. After searching Savage, Thrasher holstered his weapon and asked Savage to produce his driver's license and vehicle registration. Savage produced a Florida driver's license in his own name and a bill of sale in the name of Pavlovich. Noting that the truck bore South Carolina license plates, that the bill of sale bore a Georgia address and that Savage's license was from Florida, Thrasher questioned Savage about the ownership of the truck. In response to the officer's questions, Savage stated that the vehicle belonged to a friend, that it was empty, and that he was taking it to get the shock absorbers fixed. He also denied speeding on the campground road and stated that Thrasher was not behind him when he drove through the area. When Thrasher told Savage that Cooke was a DEA agent and would be arriving shortly, Savage became nervous, requested that Thrasher return his driver's license, and asked permission to leave. Thrasher responded that Savage was not free to leave, that he would be detained until Cooke's arrival, and that he could be held on speeding charges if necessary (I Tr. 146-150, 163-165).

When Agent Cooke arrived, approximately 20 minutes after the truck had been stopped, he identified himself, examined the bill of sale that Savage had produced, and observed that the name on it matched the name on the driver's license that Sharpe had produced. Cooke told Savage that he suspected that the pickup contained marijuana. He requested permission to search the truck, but Savage declined, explaining that he was not the owner of the vehicle (I Tr. 61,

103-105). Cooke then stepped onto the rear bumper and, noting that the truck did not move in response, confirmed his suspicion that the truck was heavily loaded. Cooke then leaned against the rear window of the camper top, took a deep breath, and "smelled a very strong and distinct odor of marijuana" (I Tr. 62, 151). Using keys that he removed from the vehicle's ignition, Agent Cooke opened the rear door of the camper and found inside a large number of burlap-wrapped bags, which he described as "similar to the large number of bales of marijuana [he had] encountered over the * * * years" that he had been employed as a DEA agent (I Tr. 62-63, 151-152).

Cooke then placed Savage under arrest and left him in Officer Thrasher's custody while he returned to the Pontiac to arrest Sharpe and his companion (I Tr. 63, 119).[3] In all, 30 to 40 minutes elapsed between the initial stop of the Pontiac and the arrests of Savage and Sharpe following the discovery of the marijuana bales in the pickup (I Tr. 120; App. B, *infra*, 17a).

Later that day, the pickup truck was taken to the Federal Building in Charleston, South Carolina. Two or three days later, DEA agents removed from the truck 43 bales weighing a total of 2,600 pounds and, acting without a search warrant, selected eight bales at random, punctured their coverings, and withdrew core samples for laboratory analysis (I Tr. 65-68). The analysis confirmed that the substance was mari-

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[3] The charges against Sharpe's companion were ultimately dismissed (App. B, *infra*, 16a). After Cooke left the location at which the pickup truck had been stopped, Savage attempted to bribe Thrasher, stating that if Thrasher would remove Savage's handcuffs and permit him to escape, "the owner of the truck would send [Thrasher] thirty thousand dollars" (I Tr. 154).

juana. On the basis of this evidence, the district court denied respondents' motions to suppress the contraband and to suppress Sharpe's pseudonymous driver's license and the bill of sale for the pickup truck (I Tr. 221-222; II Tr. 151-154).

2. A divided court of appeals reversed respondents' convictions (App. B, *infra*, 14a-51a). The majority assumed that Agent Cooke "had an articulable and reasonable suspicion that [respondents] were engaged in marijuana trafficking when he and Thrasher stopped the Pontiac and the truck" (*id.* at 19a). But the court held the investigative stops of respondents unlawful because they "failed to meet the requirement of brevity" (*ibid.*) thought to govern such detention on less than probable cause, which it inferred from this Court's decisions in *Dunaway* v. *New York*, 442 U.S. 200 (1979), *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and *Terry* v. *Ohio*, 392 U.S. 1 (1968). The court of appeals relied particularly (App. B, *infra*, 19a-20a) upon language in *Brignoni-Ponce* describing a *typical* border patrol investigatory stop (stated to be permissible if based on reasonable suspicion) as " 'usually consum[ing] no more than a minute.' " 422 U.S. at 880, quoting Brief for the United States at 25. The majority considered only the duration of the respondents' detention in holding that the encounter had exceeded the scope of investigation permissible on the basis of reasonable suspicion. Noting that "Sharpe was detained * * * for thirty to forty minutes before Cooke returned to the Pontiac to arrest him, and [that] Savage was held * * * by Thrasher for at least fifteen minutes before being questioned and finally arrested by Cooke," the majority concluded that "the length of the detentions effectively transformed them into de facto arrests without bases in probable cause" and that the deten-

tions therefore constituted unlawful seizures under the Fourth Amendment (App. B, *infra*, 20a).

The court further concluded that the shipment of marijuana discovered in the pickup truck should have been suppressed as the fruit of the unlawful detention of respondents (App. B, *infra*, 21a-22a).[4] The court reasoned that, but for the extended detention of Savage, "Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck" (*id.* at 22a). The fact that the odor of marijuana was apparent to Agent Cooke when he approached the truck was deemed irrelevant because "Cooke's smelling of the marijuana was so intertwined with the circumstances of the unlawful detentions" (*ibid.*).

As an alternative basis for mandating suppression of the contraband, the court of appeals majority held that the DEA agents' warrantless search of the burlap-wrapped marijuana bales discovered in the pickup truck violated the Fourth Amendment (App. B, *infra*, 23a-25a). The court concluded that, under either the analysis adopted by the plurality opinion in *Robbins* v. *California*, 453 U.S. 420 (1981), or the expectation-of-privacy analysis employed in Justice Powell's concurring opinion in that case (*id.* at 429-430), the warrantless search of the bales was impermissible.

Judge Russell dissented (App. B, *infra*, 26a-51a). He disagreed with the majority's initial holding that an investigative detention on less than probable cause is invariably unlawful if more than momentary. Instead, he wrote, in determining whether the length of

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[4] The court of appeals deemed it unnecessary to decide whether Sharpe's driver's license and the bill of sale covering the truck should have been suppressed (App. B, *infra*, 22a n.2).

detention renders a particular stop unreasonable, the courts must look to the totality of the circumstances justifying the detention (*id.* at 29a). Judge Russell observed that any delay that prolonged respondents' detention in this case was not attributable to the law enforcement officers, but was occasioned by respondent Savage's efforts to avoid being stopped together with respondent Sharpe. Because it was reasonable to detain both respondents for questioning by DEA Agent Cooke concerning their suspected joint drug trafficking activities, Judge Russell concluded that the detention of respondents did not violate the Fourth Amendment (*id.* at 29a-38a).

Judge Russell also rejected the majority's alternative holding disapproving the warrantless search of the marijuana bales (App. B, *infra*, 39a-51a). He reasoned that the distinctive odor emanating from the 2,600 pounds of marijuana effectively "place[d] the contents of the bales in 'plain view' " (*id.* at 44a-45a) and accordingly rendered their warrantless search permissible.

3. After rehearing en banc was denied by an equally divided court,[5] the United States sought review in this Court. Our petition, No. 81-1736, presented three questions for review: whether the investigative detention of respondents was unlawfully prolonged; whether the marijuana found in the pickup truck was correctly found to be a fruit of any unlawful detention; and whether the warrantless search of the bales was itself unlawful. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of the intervening decision in *United States* v.

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[5] See 81-1736 Pet. App. 39a-40a.

Ross, 456 U.S. 798 (1982). *United States* v. *Sharpe*, 457 U.S. 1127 (1982).[6]

4. On remand, a divided court of appeals again reversed the convictions (App. A, *infra*, 1a-13a). The majority concluded that, in light of *Ross*, it was required to "disavow" (App. A, *infra*, 2a) its alternative holding disapproving the warrantless search of the marijuana bales. But "[f]inding that *Ross* does not adversely affect our primary holding that the initial stop of the vehicle and the lengthy detention of the two defendants constituted illegal seizures," the court readopted the prior opinion as modified, reaffirmed its previous decision, and reversed the convictions (*id.* at 2a-3a).

Judge Russell again dissented. In his view this Court's remand required the court of appeals to reconsider its conclusion that the detention of respondents was unlawfully prolonged (App. A, *infra*, 5a-7a).[7] Addressing that issue, he urged that the court's adherence to its prior decision was inconsistent with *Michigan* v. *Summers*, 452 U.S. 692 (1981), and improperly failed to take into account the respondents'

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[6] Justice Stevens, joined by Justices Brennan and Marshall, dissented from this disposition, stating (457 U.S. at 1128):

> The issue presented in this case is whether a warrantless search [of respondent's vehicle] was itself legitimate. Since our opinion in *United States* v. *Ross* sheds no light on the proper disposition of the case, I respectfully dissent.

[7] The majority declined the urging of the dissent to reconsider its "principal holding or to reargue the same issues that were addressed in detail in the original majority and dissenting opinions," reasoning that its action complied with this Court's mandate (App. A, *infra*, 2a n.1).

responsibility for the circumstances that prolonged their detention (App. A, *infra*, 8a-9a).[8]

REASONS FOR GRANTING THE PETITION

1. The question whether the police may, on the basis of reasonable suspicion not amounting to probable cause, detain a person for a limited but more than momentary period where necessary to advance their investigation is a matter of great practical importance to federal and state law enforcement authorities. If allowed to stand, the holding of the court below that, absent probable cause, investigatory stops that are more than momentary are per se unreasonable under the Fourth Amendment, without regard to the facts or circumstances that affect the duration of the detention, will seriously impede legitimate investigate activities by law enforcement officers. The decision below is also fundamentally at odds with the pertinent decisions of this Court and is inconsistent with decisions of other courts of appeals that have addressed the issue.

a. In *Michigan* v. *Summers* this Court held that it was lawful for the police to detain the occupants of a house on less than probable cause while executing a warrant authorizing a search of the premises for contraband. In reaching this result, the Court recognized that "some seizures significantly less intrusive than an arrest have withstood scrutiny under the

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[8] Prior to entry of the court of appeals' judgments on remand, the opinions were circulated to the full court. A suggestion for sua sponte en banc reconsideration was made by a member of the court but failed to garner the necessary majority vote. Nevertheless, the opinions on remand reflect that the full court was divided five to four in favor of the decision of the panel majority (App. A, *infra*, 3a, 4a, 13a).

reasonableness standard embodied in the Fourth Amendment" (452 U.S. at 697) even though supported by less than probable cause. Moreover, the Court emphasized (*id.* at 700; footnote omitted) that

> the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* [v. *Ohio*, 392 U.S. 1 (1968)] and *Adams* [v. *Williams*, 407 U.S. 143 (1972)].

The Court explained (*id.* at 700 n.12):

> If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*.

The Court also quoted with approval Professor La Fave's comments on the permissible scope of investigative detention based on reasonable suspicion:

> "It is clear that there are several investigative techniques which may be utilized effectively in the course of a *Terry*-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other peo-

> ple. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale."

Michigan v. *Summers*, *supra*, 452 U.S. at 700-701 n.12, quoting 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978). Professor LaFave's summary of the governing principles concludes that the permissibility of extending a *Terry* stop should turn on "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and whether it is rather essential to the investigation that the suspect's presence be continued during that interval." *Id.* at 40. See *Michigan* v. *Summers*, *supra*, 452 U.S. at 701-702 n.14. Thus, while *Summers* itself involved the detention of a suspect in the course of conducting a warrant-authorized search of his premises, the Court's analysis clearly demonstrates that a law enforcement officer making a valid *Terry* stop may also lawfully detain the suspect for more than a brief moment if such action is reasonably required in order to pursue a legitimate avenue of investigation.

The Court's recent decision in *United States* v. *Place*, No. 81-1617 (June 20, 1983), reaffirms these principles.[9] Although the Court held there that "on

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[9] *Place* was decided ten days prior to filing of the decision below, and the court of appeals' opinion reflects no awareness of *Place* (see App. A, *infra*, 10a-11a (Russell, J., dissenting, noting grant of certiorari in *Place*)), probably because the

the facts presented" (slip op. 13) the 90-minute investigative detention was unduly prolonged, it once again acknowledged "the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*" (slip op. 12). To be sure, the Court recognized (as do we) that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion" (slip op. 12-13). But the Court pointedly "decline[d] to adopt any outside time limitation for a permissible *Terry* stop" (slip op. 13), explaining that adoption of a "rigid time limitation," such as the 20 minute period allowed by the American Law Institute's Model Code of Pre-Arraignment Procedure, would be unwise because it "would undermine the * * * important need to allow authorities to graduate their responses to the demands of any particular situation." Slip op. 13 & n.10. Moreover, the Court emphasized that the reasonableness of a given period of detention cannot be assessed without regard to the diligence—or lack thereof—of police in pursuing their investigation by reasonably available means. Slip op. 13.

The courts of appeals have also upheld the detention of a suspect beyond a momentary stop in a number of different settings, where the justification for extending the detention outweighed the intrusion on the suspect's privacy. For example, in *United States* v. *Short*, 570 F.2d 1051, 1054-1055 (D.C. Cir. 1978), the court held that it was permissible for the police

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court of appeals' opinion was prepared well in advance of filing (see *id.* at 3a). The court of appeals' failure to consider *Michigan* v. *Summers*, noted in Judge Russell's original dissent (App. B, *infra*, 28a, 37a), is less readily explicable.

to detain a burglary suspect, whom they lacked probable cause to arrest, for the purpose of transporting the suspect to the scene of the burglary for possible identification by the victim. Accord, *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). And in *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976), the court concluded that the Fourth Amendment permitted the police to detain a person suspected of smuggling firearms for the period necessary to obtain the presence of a law enforcement officer with specific expertise in conducting investigations of such offenses. Accord, *United States* v. *Moore*, 638 F.2d 1171, 1174 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981) (approving investigative detentions necessary to obtain presence of police officers with special expertise; collecting cases).[10]

b. The decision of the court of appeals is plainly contrary to the foregoing teaching of this Court, and to the above-cited decisions of other courts of appeals. In light of the Court's unequivocal statements in *Summers* and *Place* that *Terry*, *Adams* and *Brignoni-*

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[10] See also *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (approving detention of two persons suspected of drug smuggling for more than an hour while DEA agents checked with the Federal Aviation Administration to determine whether the aircraft in which the suspects were about to depart was stolen); *United States* v. *Mayes*, 524 F.2d 803, 805-808 (9th Cir. 1975) (upholding detention of suspected drug smuggler for an hour and a half while Border Patrol agents attempted to verify or disprove suspect's exculpatory explanation concerning his activities); *United States* v. *Contreras-Diaz*, 575 F.2d 740, 745 (9th Cir.), cert. denied, 439 U.S. 855 (1978) (inability of suspected illegal aliens to furnish valid identification justified their prolonged detention to permit a check with the Border Patrol).

Ponce do not mark the outer perimeter of permissible investigation, the court of appeals' reliance upon those very cases to establish a rigid limit of a few minutes upon the duration of such detentions is clearly unwarranted. And the court of appeals' refusal to consider the law enforcement purposes to be served by the detention, the time needed reasonably to effectuate those purposes, or the circumstances of this case that prolonged respondents' detention is contrary to the explicit directions of this Court.

Here the totality of the circumstances demonstrates the reasonableness of respondents' detention. First, the court of appeals did not dispute that at the time he asked Officer Thrasher to signal respondents' vehicles to stop, Agent Cooke had a reasonable suspicion that respondents were engaged in illegal activity. Cooke observed the vehicles during the early morning hours as they travelled in tandem for 21 miles in an area near the coast frequented by drug traffickers. In addition, the pickup truck appeared to be heavily loaded and the windows of the camper were covered. Finally, respondents' vehicles took evasive actions and began speeding after Thrasher, in his marked police car, joined Agent Cooke in following respondents. Based on these facts, Cooke acted properly in attempting to stop respondents' vehicles for the limited purpose of questioning respondents about their activities and attempting to ascertain whether the pickup was loaded with drugs.[11]

It is similarly clear that the 30 to 40 minute period of detention between the initial stopping of respond-

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[11] We note in addition that Officer Thrasher apparently had probable cause to arrest both respondents for speeding. Thus, there can be no question as to the propriety of the initial stop of either respondent.

ent Sharpe and his arrest, and, a fortiori, the roughly 25 minutes elapsed in respondent Savage's case, was entirely reasonable under the circumstances. Agent Cooke diligently pursued his investigation, seeking assistance when necessary from other law enforcement agencies, both state and local. See pages 3-4, *supra*. Compare *United States* v. *Place*, *supra*, slip op. 13 & n.9; *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 14-15 (opinion of White, J.). This diligent pursuit of the investigation strongly supports a determination of reasonableness. *United States* v. *Place*, *supra*, slip op. 13; *Michigan* v. *Summers*, *supra*, 452 U.S. at 701-702 n.14.

Moreover, as Judge Russell observed in his dissent below (App. B, *infra*, 29a-31a, 38a), the delay found excessive by the majority was no fault of the officers but was almost entirely attributable to the evasive action taken by respondent Savage, which resulted in respondents' being stopped a half-mile apart by different law enforcement officers. The fact that respondents were stopped at separate locations made it impossible for Cooke, the only DEA agent on the scene, to inspect the pickup truck, which was the focus of his suspicion, and to question its driver, respondent Savage, until police reinforcements arrived to maintain the status quo with respect to respondent Sharpe.[12] Cooke's unsuccessful efforts to contact Offi-

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[12] Consideration of the alternatives open to Agent Cooke is instructive. He could simply have ignored his by then substantially heightened suspicions and permitted Sharpe to go—a course of action that many reasonable people would surely view as quite irresponsible in the circumstances. Or, assuming that his vehicle was equipped to transport respondent Sharpe (and his passenger) securely, and that it was prudent to leave Sharpe's Pontiac unguarded, Agent Cooke might have taken Sharpe to the location where Officer Thrasher had

cer Thrasher by radio, his wait for reinforcements, and his trip from Sharpe's Pontiac to the pickup, all necessitated by the separation, consumed most of the period—perhaps 20-25 minutes (I Tr. 103). Once Cooke finally reached the pickup, less than 10 minutes elapsed before he discovered the marijuana, placed Savage under arrest, and returned to arrest Sharpe (I Tr. 105, 114, 120).[13] In short, the officers' actions in stopping respondents and detaining them for a limited period to pursue a legitimate investigation into suspected criminal conduct is simply an example of good police work. The officers' "graduate[d] * * * responses to the demands of [the] particular situation" (*United States* v. *Place*, *supra*, slip op. 13 n.10) plainly meet the Fourth Amendment's standard of reasonableness.[14]

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stopped Savage. But even if this were otherwise feasible, it would have required handcuffing Sharpe, placing him in a locked police car, and transporting him some distance—thereby elevating the intrusive character of the detention. And, although we would argue otherwise, the very act of transporting Sharpe might itself support a claim that investigative detention had become a custodial arrest. See *Florida* v. *Royer*, *supra*, slip op. 13 (opinion of White, J.). Plainly, the consequences of these alternatives suggest that the course adopted by Agent Cooke was at least reasonable, if not the only one open to him under the Fourth Amendment.

[13] Any time elapsed while Agent Cooke returned to the location where Sharpe was waiting is irrelevant for the additional reason that probable cause to arrest him had, by that point, arisen.

[14] The court of appeals' reliance (App. B, *infra*, 20a) on *Dunaway* v. *New York*, 442 U.S. 200 (1979), is misplaced. *Dunaway* did not hold that a detention that is extended by circumstances beyond the control of the officers is unreasonable under the Fourth Amendment. In *Dunaway*, police, acting on information (not amounting to probable cause) that

2. Even if the court of appeals were correct in concluding that the duration of the detentions rendered the seizures of respondents unreasonable under the

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implicated Dunaway in a murder, went looking for him and, after locating him at a neighbor's house, placed him in a police car and brought him to a police station without his consent. There, after being given *Miranda* warnings, Dunaway was interrogated in a custodial setting for a period of an hour, at which point he confessed to the crime. Although Dunaway had not been formally arrested and charged with a crime, the Court held that his detention without probable cause was unlawful because it was "in important respects indistinguishable from a traditional arrest" (442 U.S. at 212). In support of this characterization the Court noted the extended interrogation to which Dunaway was subjected, the involuntary transfer to the police station, and the use of an interrogation room, as well as the fact that he was not told he was free to go and in fact would not have been allowed to depart had he attempted to do so. Here, by contrast, the detention was considerably briefer than in *Dunaway*, and its length was not attributable to the deliberate actions of the officers. Moreover, respondents were not transported to a police station and placed in an interrogation room, but were questioned briefly when they were stopped.

The holding of *Florida* v. *Royer*, *supra*, that the investigative detention there had gone beyond permissible bounds is similarly distinguishable. The Court's decision there rests upon the use of unnecessarily intrusive means of investigation and conditions of restraint (see slip op. 11-12 & n.9, 13-15 (opinion of White, J.)) that have no analogue here. Moreover, the detention in that case lasted approximately 15 minutes—far more than the few minutes the court of appeals thought permissible here—and yet the plurality opinion did not suggest any illegality in the duration of the stop. Rather Justice White emphasized that the "scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case," adding that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop" (slip op. 8-9). As

Fourth Amendment, it erred in holding that the marijuana discovered in respondent Savage's pickup truck was a suppressible fruit of the improper duration of the detention. In our view, this holding stems from an erroneous application of established Fourth Amendment principles to the facts at hand.

In determining whether evidence is a "fruit" of illegal conduct, the Court has rejected a simplistic test of "but for" causation. *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963). See also *United States* v. *Ceccolini*, 435 U.S. 268, 274 (1978); *Brown*

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we have explained above, the actions of the officers in this case meet these criteria.

The other court of appeals decisions cited by the majority below (App. B, *infra*, 21a) do not support the result reached here. In *United States* v. *Chamberlin*, 644 F.2d 1262 (9th Cir. 1980), cert. denied, 453 U.S. 914 (1981), the court held that the defendant's 20-minute detention was unreasonable in the absence of probable cause, specifically noting that the defendant "was not questioned briefly where he was found. He was placed in the back seat of a police car for twenty minutes." *Id.* at 1267. In *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979), the defendant was removed from his car and taken to a Border Patrol office, where he was detained for three hours in an interrogation room pending the arrival of DEA agents. Finally, in *United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976), the court held that a gun discovered during a frisk of the defendant should have been suppressed because the defendant was "seized and wrongfully detained for an *unnecessarily* long period against his will" (*id.* at 253; emphasis supplied), and also because the officer did not have a sufficiently particularized suspicion that the defendant was carrying a weapon or otherwise posed a threat to the officer (*id.* at 254). While we do not necessarily agree with the results in these cases, none of them analyzes the propriety of the detention solely in terms of duration. Moreover, when contrasted with the decisions discussed above at pages 14-15, *supra*, these decisions reflect the considerable uncertainty that surrounds this area of the law.

v. *Illinois*, 422 U.S. 590, 598, 603 (1975). In *Wong Sun* (371 U.S. at 487-488) the Court declined to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Rather, the Court explained (*ibid.*, quoting J. Maguire, *Evidence of Guilt* 221 (1959) (emphasis added)):

> the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by *exploitation of that illegality* or instead by means sufficiently distinguishable to be purged of the primary taint."

In this case, the discovery of the marijuana in the pickup did not in any meaningful way result from the fact that respondents' detentions were extended beyond a couple of minutes.

The court of appeals reasoned that Agent Cooke's discovery of the marijuana was a product of the length of respondents' detention because "Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck, had Savage not been detained for longer than constitutionally permissible under an investigatory stop" (App. B, *infra*, 22a). However, this is precisely the sort of "but for" test that this Court has consistently rejected. A proper fruits analysis should have focused instead on whether the information establishing that there was probable cause to believe that the pickup contained marijuana was obtained by Agent Cooke through exploitation of the hypothetically overlong detentions of respondents. This entails a separate inquiry as to each respondent.

a. With respect to respondent Savage, we submit that the information that a strong odor of marijuana

emanated from the pickup truck was immediately discoverable, and thus, although discovery of that information was delayed, the information itself should be deemed a fruit of the lawful stop and not of any allegedly unlawful prolongation of the detention. This is not a case in which a time-consuming search was needed to uncover evidence. In such a case the evidence may plausibly be said to result from "exploitation" of the illegality—the duration of the detention. But at the time of the initial stop of respondent Savage's pickup, Agent Cooke was well acquainted with the distinctive odor of marijuana; the extended nature of Sharpe's detention clearly did not enhance Cooke's ability to smell and accurately to identify that odor. See *United States* v. *Crews*, 445 U.S. 463, 472 (1980). Moreover, there is no reason to suppose that the odor of marijuana from the pickup became more pronounced, and thus more easily discoverable, as a result of the prolonged detention. Accordingly, as in *Michigan* v. *Summers*, *supra*, 452 U.S. at 701 (footnote omitted), this is not a situation in which suppression is warranted because the detention was "unduly prolonged in order to gain more information"; instead, the information was "obtained through [detection of the readily apparent odor of marijuana] and not through the detention."

This case is readily distinguishable in this respect from other situations in which an unlawful detention has been held to taint the discovery of evidence. For instance, in *Dunaway* v. *New York*, *supra*, given the finding of a de facto arrest based on the maintenance of interrogation in custodial conditions, it was not unreasonable (in the absence of an intervening act of free will) to treat a confession secured at the end of the period of detention as evidence arrived at by ex-

ploitation of the unreasonable conditions and duration of the detention. Similarly, in *Florida* v. *Royer*, *supra*, where the evidence was found through a consent to search personal luggage given while an individual was unlawfully detained, it was reasonable to conclude that the intrusiveness of the detention contributed to the defendant's consent. But what was discovered here was *real evidence*. Thus the fruits analysis here is not to be influenced by a possibility that the duration of detention contributed to ensuing statements or actions of the defendant.

The court of appeals' analytical error has considerable theoretical importance and has significant adverse practical implications for administration of the exclusionary rule. Under the analysis employed by the court of appeals, any real evidence found at the scene of an unlawfully extended investigative detention apparently will be deemed tainted; it is difficult to conceive of any circumstances that would be recognized as dispelling the taint. There is no warrant for this sweeping application of the exclusionary rule.

b. As to the detention of respondent Sharpe, the court of appeals' confusion is much clearer. The discovery of the marijuana was a product of the stop of Savage (albeit not of the duration of that stop); it plainly was not the result (under *any* standard of causation) of any official impropriety connected with the detention of respondent Sharpe. Accordingly, the marijuana may in no event properly be suppressed (as to either respondent) on the basis of the somewhat greater duration of the detention of Sharpe (see also page 18 note 13, *supra*).[15] Moreover, the discov-

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[15] Indeed, the court of appeals' fruits analysis appears to focus exclusively upon the question whether the detention of Savage tainted the discovery of the marijuana (App. B, *infra*,

ery of the marijuana following *Savage's* detention "invaded no right of privacy of person * * * which would entitle [Sharpe] to object to its use at his trial." *Wong Sun* v. *United States*, *supra*, 371 U.S. at 492.[16]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1983

22a). The court of appeals' conclusion that Sharpe's detention was unlawful may accordingly be surplusage. But it is not clear that the court of appeals' determination that the detention of Savage was unlawful was based entirely on the duration of *his* detention.

[16] For the same reason, of course, if suppression were required solely because of the duration of Sharpe's detention, it would not inure to the benefit of respondent Savage.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5314

WILLIAM HARRIS SHARPE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 79-5315

DONALD DAVIS SAVAGE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On remand from the Supreme Court of the United States

Submitted: July 27, 1982 Decided: June 30, 1983

Before WINTER, RUSSELL, and ERVIN, Circuit Judges.

ERVIN, Circuit Judge:

The Supreme Court has vacated our decision in *Sharpe v. United States*, 660 F.2d 967 (1981), and has remanded[1] this case to us, —— U.S. ——, 73 L.Ed.2d 1345 (1982), with the direction that we reconsider it in light of *United States v Ross*, 456 U.S. ——, 72 L.Ed.2d 572 (1982). We have now done so. We conclude that by virtue of *Ross*, the decision of the Supreme Court in *Robbins v. California*, 453 U.S. 420 (1981), upon which we relied as an alternative basis for our decision in *Sharpe*, is no longer valid. Accordingly, we disavow the rationale set forth in Section IV of the majority opinion. We also modify Section V of that opinion by deleting therefrom the words "either . . . or because the warrantless search of the bales was unlawful."

Finding that *Ross* does not adversely affect our primary holding that the initial stop of the vehicle and the lengthy detention of the two defendants constituted illegal seizures, we readopt the majority

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[1] The Supreme Court's order reads, in part . . . "this cause is remanded . . . for further consideration in light of *United States v. Ross*, 456 U.S. —— (1982)." We have complied with this mandate. We do not believe it is appropriate, despite the urging of our dissenting brothers, to go beyond this explicit instruction and to reexamine our principal holding or to reargue the same issues that were addressed in detail in the original majority and dissenting opinions. Our conviction that we should so limit our reconsideration is buttressed by the comments of the dissenting justices who are clearly focusing only on the application of *Ross* to our principal holding. Had the Supreme Court felt that a reversal was in order, it could and would have said so. If we have misconceived the Court's wishes, the future will take care of that omission on our part.

opinion as modified herein, reaffirm our previous decision, and reverse the convictions.

I am authorized to state that Chief Judge Winter, a member of the original panel, and Judges Phillips, Murnaghan, and Sprouse join in the views expressed in this opinion.

RUSSELL, Circuit Judge, dissenting:

When an opinion-order by the majority on remand of this appeal by the Supreme Court, which opinion-order was for all practical purposes in the same language as the present opinion distributed as of May 30, 1983, was first submitted by the majority of the panel on November 16, 1982, I promptly submitted my dissent on November 19, 1982. On the same date there was filed a motion by an active member of the Court to hear *en banc* this opinion-order. When the motion did not command the required Court majority, I again on December 14, 1982, submitted a dissent.

The majority has now submitted the present opinion and order. I reiterate my dissent both to the original opinion-order and to the denial of *en banc* hearing.

I submit my dissent to the denial of *en banc* hearing as my dissent to the present opinion-order herein. This dissent is as follows:

RUSSELL, Circuit Judge, dissenting:

I hesitate to file another dissent in this case, this time on the denial of a motion, made by a member of this Court, for an *en banc* hearing on an order on remand from the Supreme Court. I feel so strongly that our action on remand is contrary to the mandate of the Supreme Court that I am compelled again to state my views.

Implicit in the decision filed by the majority on remand in this case is the assumption that the Supreme Court overlooked inadvertently that the majority's original decision which was vacated by the Supreme Court rested "primarily" on a sound ground that was not involved in *United States v. Ross*[1] and that, therefore, it was not necessary to disturb the result or to vacate the reversal of the convictions below as decided by the panel majority in their initial opinion. What the majority of this Court plainly stated is that the Supreme Court in reviewing this case failed to consider the ground on which the majority of our panel decided this case. I find, with due deference for the contrary opinion of my brothers, this to be a misreading of the Supreme Court decision.

I suggest with the utmost confidence that the majority of the Supreme Court did not overlook the first ground given by the majority of this Court for its initial decision, as the majority inaccurately would believe. Three members of the Supreme Court, in dissent, noted in particular this very ground and, to some extent at least, indicated they thought the Supreme Court should address it as entitled to some consideration in this context. The majority of the Supreme Court obviously did not agree and proceeded,

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[1] *United States v. Ross*, 456 U.S. —— (1982).

by their action, to demonstrate (conclusively I suggest) that they did not feel that the first ground listed in our prevailing panel opinion provided any arguable basis for reversing the convictions below. Had they thought otherwise, they would simply have affirmed the reversal of the convictions as ordered in our initial opinion herein. I say that because it is a well-settled and oft-repeated rule of appellate procedure that, if the result of the decision which is challenged on appeal is correct for any reason, whether stated by the lower court or not, the decision of the lower court is affirmed. *Riley Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). I am sure the Supreme Court is as well aware of its own Rules as we are. Under this rule, if the first ground in our initial opinion had been, in the opinion of the majority of the Supreme Court correct and supported a reversal of the convictions below, as the majority found in our panel opinion, the Supreme Court would have affirmed that opinion; better still, it would probably not have granted certiorari at all in this case. It did not do this; however. On the contrary, it vacated our decision and instructed us to decide the case on the basis of *United States v. Ross*.

The order on remand by us would assume, though, that the Supreme Court did not decide that *United States v. Ross* was controlling on the decision in this case and did not instruct us to decide this appeal on remand on the basis of *United States v. Ross;* it, in the opinion of the majority of the panel, only instructed us to "consider" *United States v. Ross* but left to us to determine, after considering *Ross*, whether it had any relevancy to the result reached by us in this case. Once again, I think the majority

has mistaken gentleness in instruction for indefiniteness in command. The Supreme Court was seeking to be gentle with us but there is, I submit, no mistaking what they expected us to do. The Supreme Court thought *Ross* both relevant and dispositive and I would accept the plain direction of the Supreme Court.

I think it is plain why the majority of the Supreme Court didn't waste time on the first point made in our initial opinion herein. This is obvious when we look at the only detention and the only search really relevant in this action. Let's focus on the only search that was important in this case.[2] That was the search of the van. It was the contraband in the van that convicted the defendants. The Pontiac car was only the lead car or guide for the van and its cargo of contraband. The Pontiac apparently transported no marijuana. The convincing evidence was in the van; the search and seizure of the van provided the critical evidence in the case; it was the suppression of the fruits of that search that was vital in this case and that made inescapable the proof of the guilt of the defendants. I say this because only if that search could be invalidated could the defendants keep out of the trial the contraband, the evidence which convicted the defendants. Since the first ground stated in our original opinion focused on the length of the detention or intrusion, the only issue was whether the detention of the van, but only the van, was illegally extended. What was the length of delay in that case?

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[2] In this discussion, I do not review anew the facts of this case. Those facts are adequately detailed in the majority and dissenting opinions in the original decision. *Sharpe v. United States*, 660 F.2d 967 (4th Cir. 1981).

Our original opinion states the length of that delay. It states that: "When Cooke [the DEA agent] arrived approximately fifteen minutes after the truck had been stopped . . . ." 660 F.2d at 969. Later it said: ". . . Savage [the operator of the van] was held under custodial arrest without probable cause by Thrasher [the highway patrolman who stopped the van at the instance of Cooke] for at least fifteen minutes before being questioned and finally arrested by Cooke." 660 F.2d at 970. And why was there a delay of fifteen minutes? The delay was occasioned by Savage's attempt to elude the DEA officer after he and the driver of the lead car had been stopped. Savage had tried to drive off when Cooke went over to the lead car, in the process "almost hitting [the car of the highway patrolman who had assisted Cooke in stopping the caravan]," 660 F.2d at 974 (Russell, dissenting). Is delay secured by such a ploy by a drug trafficker to be rewarded by declaring a delay of but fifteen minutes, and a delay so achieved, unconstitutionally long? I think not.

Approximately a year before our decision the Supreme Court in a case that the majority did not discuss, though it was discussed and relied on in my dissent, had dealt authoritatively with delay in connection with an investigatory *Terry*-type stop. *Michigan v. Summers*, 452 U.S. 692 (1981). In that case the Supreme Court of Michigan had invalidated an investigatory stop of 50 minutes as too long. The United States Supreme Court reversed and, in so doing, declared:

> "The cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that

> they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity. In these cases, as in *Dunaway*, the Court was applying the ultimate standard of reasonableness embodied in the Fourth Amendment. They are consistent with the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause. But they demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*. Therefore, in order to decide whether this case is controlled by the general rule, it is necessary to examine both the character of the official intrusion and its justification." [pp. 699-701]

It added in an explanatory footnote, the following:

> "If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*."

After adding this language, the Court cited and quoted a statement from 3 W. LaFave, *Search and Seizure*, providing various circumstances under which detention may be properly extended.

The majority of this Court has taken some descriptive phrases out of *United States v. Brignoni-Ponce*, 422 U.S. 873 at 880, treated them improperly as prescriptive terms, and thereby converted them

into a rule that an investigatory stop could "consume no more than one minute" and could involve "only a brief question or two." 660 F.2d at 970. That the language in *Brignoni-Ponce* was purely descriptive of the circumstances of that case and was not to be treated as a statement of an absolute rule that the detention in an investigatory stop may not be "longer than the brief time period allowed in *Terry* and *Adams*," was unquestionably demonstrated by the language of the Supreme Court in its latest decision on investigatory stops, rendered only a few months ago in *Summer*. What I have never understood is the panel majority's complete reluctance to even note, much less discuss or to consider the Supreme Court's latest decision on investigatory stops in this connection. In that case the Supreme Court very plainly stated that the officers, in effecting an investigatory stop, "must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*." If there ever were 'circumstances" which would warrant "longer" detention than "the brief time period involved in *Terry* and *Adams*, they were present here. The driver of the van himself caused the short delay (*i.e.*, 15 minutes) by seeking to elude the officers and to escape. *Had he not done this, there would have been no delay at all.* What the panel majority, by its ruling, did was to reward his wrongful conduct in seeking to escape by granting him what it describes as constitutional protection. I do not believe we have to go that far in order to uphold the Constitution as a shield for the guilty.

Moreover, on the same day as the Supreme Court remanded this case, it granted certiorari in *United States v. Place*, 660 F.2d 44 (2d Cir. 1981). *See*, 73

L.Ed.2d 1312, 1314. The point in issue was the alleged invalidity of a search and seizure because of the extended time taken in an invesigative stop. The search involved was of baggage rather than of a person but the Court said: ". . . the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property. In both cases there is an infringement of the person's freedom of action." *Id.* at 51. The Court noted that under the *ALI Model Code of Pre-Arraignment Procedure* § 110.2(1) (1975), "a detention not based on probable cause and not consented to [had been] limited to a maximum of twenty minutes' duration." *Id.* at 51. In this case, the officers had seized the defendant's baggage at the airport, "remov[ed] it to another location several miles away for a period of at least 1½ to 2 hours for the admitted purpose of determining whether it contained narcotics." *Id.* at 51. It held that, "[i]n our view this protracted dispossession [of approximately two hours] cannot reasonably be characterized as a *Terry*-type 'investigative stop.'" *Id.* at 52.[3] The Supreme Court has granted certiorari to review that two-hour rule.

I have mentioned *Summers* and *Place* to show that the Supreme Court is alert to the point which the majority assumes was inadvertently passed over by the Supreme Court. It is inconceivable that it ne-

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[3] In *United States v. Regan*, 687 F.2d 531, 537 (1st Cir. 1982), the First Circuit, which found a detention of twenty-two hours too long, said, however, that it was not prepared to accept what it called the Second Circuit's two-hour rule, as stated in *Place*, 660 F.2d at 51, and held that every detention had to be determined on its own facts and circumstances, which was exactly what *Summers* said.

glected to discuss the majority's first ground for reversal of the convictions because it did not perceive the point. The reason the Supreme Court did not advert to the length of the stop was manifestly because it considered the point without merit. To repeat: The only reason the Supreme Court did not feel required to discuss the length of the detention in this case was that the delay of the van was not unconstitutional under any view of the case and certainly not under the standard established so recently in *Summers*. The delay, as the majority found it, was fifteen minutes. This was less than a third the delay in *Summers*, it was one-fourth less than the time allowed under the ALI rule, as quoted in *Place*, and it was one-eighth the delay in *Place*. Moreover, the delay itself was caused by the effort of the driver of the van to elude an investigatory stop. Under such circumstances, the Supreme Court very properly saw no reason to address in any detail the first point in the majority's opinion.

There is another feature to this case that should be observed. After the highway patrolman had stopped the van, the driver offered the patrolman a substantial bribe to allow him to escape. He wanted to avoid being connected with the van. That conduct was the strongest evidence that the van contained contraband and that the driver wanted to disassociate himself from the van. There is no clear evidence when this occurred during the 15 minutes of the detention, but, when it did occur, I submit, the officers had from that time forward probable cause to search the van.

With all deference to my brothers, I cannot agree to a decision which would void the convictions in this case on the ground that a detention of a van for 15 minutes, a delay caused by the driver of the van's

attempt to escape, was an unconstitutional investigative stop. I, therefore, dissent from a denial of *en banc* hearing on the final order entered on remand from the United States Supreme Court.

I am authorized to state that Judges Widener, Hall and Chapman join in this dissent, as they also did in my dissents to the original opinion-order and to the denial of *en banc* hearing.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 79-5314, 79-5315

WILLIAM HARRIS SHARPE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

DONALD DAVIS SAVAGE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Argued Jan. 8, 1981

Decided Sept. 4, 1981

Before WINTER, RUSSELL and ERVIN, Circuit Judges.

ERVIN, Circuit Judge:

William Sharpe and Donald Savage were indicted for possession with intent to distribute a controlled substance (marijuana) under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.[1] At the hearing on the motions to

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[1] 21 U.S.C. § 841(a)(1) states that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

[Footnote continued on page 2a]

suppress, which was conducted during the bench trial of these charges, Sharpe and Savage challenged the admission of certain evidence as the fruit of unlawful searches and seizures in violation of the Fourth and Fourteenth Amendments. The district court denied the motions and consequently found them guilty under the above statutes. We find the denial of the motions to suppress to be error and reverse.

I.

On June 9, 1978, Luther Cooke, an agent with the Drug Enforcement Administration (DEA), on patrol in an unmarked car along the coast of North and South Carolina, an area under surveillance for suspected drug trafficking, spotted a pickup truck with an attached shell camper, followed by a Pontiac. Observing that the truck was riding low in the rear and appeared overloaded, and that a quilted material covered the rear window of the camper, Cooke proceeded to follow the vehicles south. After approximately twenty miles, Cooke determined that he would make an investigatory stop of the vehicles, and he dispatched a request for aid, to which South Carolina Highway Patrolman Thrasher responded.

Some time after Thrasher joined the procession, the Pontiac and the truck turned onto a loop road through a campground. At no time prior to the turn

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[1] [Continued]

18 U.S.C. § 2(a) directs that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal," and § 2(b) states that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

had the occupants of the truck or vehicle signaled to or communicated with each other, and they did not attempt to do so as they drove the loop road through the campground. Thrasher later testified, however, that the truck and Pontiac were speeding as they drove along that road. At the end of the loop, the vehicles turned back onto the main coastal highway and again proceeded south toward Myrtle Beach.

Shortly thereafter, Cooke stopped the Pontiac and Thrasher stopped the truck. Cooke approached the Pontiac's occupants and identified himself. He requested and received an operator's license from the driver, Sharpe; the license was in the name of Raymond J. Pavlovich. Sharpe and his passenger Davis (the charges against whom were later dropped) were not told why they had been stopped. Several minutes later, Cooke radioed the local police for assistance, and two officers from the Myrtle Beach Police Department eventually arrived, in uniform and armed. Asking the local police to "maintain the situation," Cooke turned custody of Sharpe and Davis over to them and left to join Thrasher, who was with the truck a few blocks further south.

After stopping the truck, Thrasher had approached it with his revolver drawn, had ordered the driver to get out of the truck and to assume a spread-eagle position against its side, and had searched him. At Thrasher's request, the driver had produced a Florida license identifying him as William Savage and a bill of sale for the truck in the name of Pavlovich. Thrasher gave Savage no reason for the stop, but indicated that he would hold him there until Cooke arrived. Savage had then requested the return of his license and permission to leave. Thrasher had refused to return the license and told Savage that he was not free to leave, as he was under custodial arrest, and

that he could detain Savage on speeding charges if necessary.

When Cooke arrived approximately fifteen minutes after the truck had been stopped, he identified himself as a DEA agent, and Thrasher handed him Savage's license and the bill of sale. Cooke twice requested that he be allowed to search the camper and was refused both times. Cooke then stepped onto the rear bumper and observed that it did not lower appreciably. He leaned against the rear of the camper, breathed deeply, and announced that he detected the smell of marijuana. Cooke removed the keys from the ignition, unlocked the camper and searched it, finding a number of highly compressed, well-wrapped burlap bales but no marijuana residue.

After the search of the camper, Cooke placed Savage under arrest and left him in Thrasher's custody while he returned to the Pontiac, where he placed Sharpe under arrest. By the time Sharpe was arrested, approximately thirty to forty minutes had elapsed since Cooke had first stopped the Pontiac.

Cooke then assembled the various parties and vehicles and led them to the Myrtle Beach police station. That evening the truck was driven to the Federal Building in Charleston, and two or three days later, Cooke supervised the unloading of the truck, which contained forty-three intact bales. Eight randomly selected bales were then searched, and analysis of samples taken from them revealed that the bales contained marijuana. No search warrant was obtained prior to the unloading and analyzing of the bales and their contents. Cooke retained two of the eight bales as evidence and stored them in a vault in his office; the rest were destroyed by fire, under the direction of the Assistant United States Attorney and without permission of the district court.

II.

We consider first whether the vehicle stops and the detentions of Sharpe and Savage were unlawful seizures under the Fourth and Fourteenth Amendments.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), provides that "[t]he right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S.Const. amend, IV. The amendment has been construed generally to allow a law enforcement official to stop a moving vehicle without a warrant and for less than probable cause, if he has an articulable, reasonable suspicion that either the vehicle or any of its occupants is subject to seizure for violation of the law, *see Delaware* v. *Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979), and has been read in particular to allow investigatory field stops of vehicles suspected to drug trafficking, *see, e.g., United States* v. *Jiminez*, 602 F.2d 139, 142 (7th Cir. 1979); *United States* v. *Soto*, 591 F.2d 1091, 1099 (5th Cir.), *cert. denied*, 443 U.S. 930, 99 S.Ct. 2862, 61 L.Ed.2d 298 (1979); *United States* v. *Montgomery*, 561 F.2d 875, 879 (D.D.Cir. 1977); *United States* v. *Garcia-Rodriguez*, 558 F.2d 956, 964 (9th Cir. 1977), *cert. denied*, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 802 (1978).

Even though the reasonable suspicion standard requires less evidence of wrongdoing then does a showing of probable cause, the law does not free law enforcement officials from all restrictions concerning vehicle stops. Rather, it imposes upon them two sig-

nificant requirements: first, the reasonable suspicion of illegality must not be based simply on subjective belief but must be supported by articulable and objective facts, and second, the stop must be brief. *See, e.g., United States* v. *Cortez*, —— U.S. ——, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *see also Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

We can assume without deciding that Cooke had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marijuana trafficking when he and Thrasher stopped the Pontiac and the truck. We conclude, however, that the stops failed to meet the requirement of brevity.

We cannot overemphasize the importance of the brevity requirement for investigatory stops predicated upon less than probable cause; indeed, it is the transitory nature of the stop that justifies the elimination of the probable cause requirement. We note that the Supreme Court in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), heavily relied upon the short length of a stop on the street and a frisk of weapons in fashioning an exception to the probable cause requirement. Furthermore, when the Court transposed the *Terry* stop and frisk rationale to the vehicle stop situation, it was careful to emphasize the de minimis nature of such stops in justifying the intrusion under the Fourth Amendment. In *Brignoni-Ponce*, for instance, the Court noted that the Fourth Amendment required a weighing of the public interest against the interference with individual liberty that a stop causes, and it justified the border patrol investigatory stop in that case on the ground that the intrusion was "modest," usually "consum[ing] no

more than one minute," and involving only " a brief question or two." 422 U.S. at 880, 95 S.Ct. at 2579-80. The Court further cautioned that "any further detention or search must be based on consent or probable cause." *Id.* at 882, 95 S.Ct. at 2580; *see also United States* v. *Cortez*, —— U.S. at ——, 101 S.Ct. at 694 (denominating investigatory stops as brief).

The stops and detention in this case cannot be described as brief: Sharpe was detained without probable cause for arrest for thirty to forty minutes before Cooke returned to the Pontiac to arrest him, and Savage was held under custodial arrest without probable cause by Thrasher for at least fifteen minutes before being questioned and finally arrested by Cooke. Indeed, the length of the detentions effectively transformed them into de facto arrests without bases in probable cause, unreasonable seizures under the Fourth Amendment. The teaching of the recent case *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), is enlightening here. In *Dunaway*, the Court held that police violated the Fourth Amendment when, without probable cause but with a reasonable suspicion of illegal conduct, they seized an individual and transported him to the police station for interrogation. In so holding, the Court noted that Dunaway was not merely questioned briefly but was instead transported to the station for interrogation and would have been restrained if he had tried to leave; in sum, the detention "was in important respects indistinguishable from a traditional arrest," *id.* at 212, 99 S.Ct. at 2256, and, not being grounded on probable cause, it was an unconstitutional seizure.

Like the detention in *Dunaway*, the lengthy detentions of Sharpe and Savage by law enforcement officers who had no intention of allowing them to leave custody closely resembled traditional arrests. Because

probable cause did not exist prior to the detentions, we must view them as illegal seizures under the Fourth and Fourteenth Amendments. *See United States* v. *Chamberlin*, 644 F.2d 1262 (9th Cir. 1980) (twenty minute detention of individual in back of parked car, on the basis of a reasonable suspicion that criminality was afoot but without problable cause, was unlawful); *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979) (three hour detention at border checkpoint station, including two and one-half hour delay pending the arrival of DEA agents, following valid investigatory field stop of a vehicle, constituted an illegal arrest); *see also United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976) (frisk for weapons following ten to fifteen minute house search pursuant to valid search warrant not valid under *Terry*, because individual was detained longer than necessary); *cf. United States* v. *Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980) (relatively brief detention of individual in an airport on the basis of a reasonable suspicion of narcotics violation, was not an unconstitutional intrusion, the detention involving only a couple of minutes of questioning).

III.

Having determined that Sharpe and Savage were illegally detained, we must next inquire whether the bales of marijuana Cooke uncovered during his search of the truck should have been suppressed as fruits of the illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), provides the standard by which we test the admissibility of the incriminating evidence, the appropriate inquiry being "whether, granting establishment of the primary illegality, the evidence to which the instant objection is

made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged by the primary taint." 371 U.S. at 488, 83 S.Ct. at 417 (quoting Maguire, *Evidence of Guilt*, 221 (1959)).

We conclude that this case falls within the first category. Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck, had Savage not be detained for longer than constitutionally permissible under an investigatory stop. Clearly a product of Cooke's "exploitation of [the] illegality," evidence of the discovery of the bales should have been suppressed.

The government's argument that the smell of the marijuana supplied probable cause for Cooke to search the truck and thus that the evidence was properly admitted fails to persuade us that the search was constitutional. While we acknowledge that the odor of raw marijuana may provide probable cause to search a vehicle legitimately stopped, *see, e.g., United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), *aff'd on rehearing*, 615 F.2d 10 (1980); *United States* v. *Rivera*, 595 F.2d 1095 (5th Cir. 1979), it could not have done so in this case: Cooke's smelling the marijuana was so intertwined with the circumstances of the unlawful detentions that it could not have purged the illegal taint of those detentions and could therefore not have served as probable cause for a search. The bales thus were illegally seized, and the district court erred when it denied the motion to suppress.[2]

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[2] Because we have determined that the bales of marijuana should have been suppressed, we do not find it necessary to reach the question whether the district court improperly refused to suppress Sharpe's license and the bill of sale for the truck.

IV.[*]

[The bales of marijuana should have been suppressed for another, equally compelling, reason: even if there had been no illegality to taint the discovery of the bales, Cooke should have obtained a warrant before allowing a search and analysis of the bales to proceed in Charleston two or three days after the stops and detentions. We find authority for our conclusion in the Supreme Court's recent decision in *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981).]

[The *Robbins* Court reversed a conviction for drug offenses on the ground that a warrantless search of packages of marijuana wrapped in opaque green plastic and stored in the recessed luggage compartment of a station wagon was unconstitutional. Justice Stewart, in a plurality opinion joined by Justices Brennan, White, and Marshall, set forth a bright line rule that any closed, opaque container found in a vehicle during a lawful search may not be opened without a warrant. Relying on the Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), in which a warrantless search of a footlocker filled with marijuana and seized from the open trunk of a parked automobile was held unconstitutional, and in *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), in which the Court held that the warrant requirement applied to the search of a suitcase filled with marijuana and found in the trunk of a stopped vehicle, the plurality rejected the government's argument that a closed container in a vehicle may be subject to a warrantless search under the au-

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* The rationale of the bracketed paragraphs that follow was "disavow[ed]" by the court of appeals when it reconsidered the case upon remand from this Court. See App. A, *supra*, 2a.

tomobile exception. It furthermore rejected a "worthy container" rule, concluding that there is no constitutional distinction to be made among various closed containers such as suitcases, briefcases, portfolios, duffle bags, and boxes: all closed containers manifest an individual's reasonable expectation of privacy in their contents, unless a container by its very appearance betrays an illegal purpose or its contents are exposed to plain view. *See Arkansas* v. *Sanders*, 442 U.S. at 764-65 n.13, 99 S.Ct. at 2593-94 n.13. The plurality stressed, moreover, that the Fourth Amendment does not draw a distinction between personal and impersonal effects; as it succinctly stated, "Once placed within [a closed, opaque container], a diary and a dishpan are equally protected by the Fourth Amendment." —— U.S. at ——, 101 S.Ct. at 2846.]

[Joining in the judgment but not the opinion of the plurality, Justice Powell in a concurring opinion rejected the bright line rule, instead premising his conclusion that the search was unlawful on the ground that the defendant had a reasonable expectation of privacy in the carefully wrapped and sealed packages. While acknowledging the benefits of a bright line rule, Justice Powell reasoned that the plurality's rule in this case placed an unduly heavy burden on law enforcement officers to obtain warrants for the search of trivial containers.]

[Applying *Robbins*, we think that under either the plurality's bright line rule or Justice Powell's reasoning in concurrence, the warrantless search of the bales in the back of the truck was unconstitutional. The well-packaged bales [3] were located in the equivalent

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[3 Each bale consisted of a tube of marijuana wrapped first in paper bags, then in a taped plastic bag, and finally in burlap tied with twine. Cooke acknowledged in his testimony that the marijuana was extremely well packaged.]

of a luggage compartment and were "closed containers" within the meaning of the plurality opinion, and, as their appearance did not manifest their contents,[4] the warrantless search was unconstitutional under the bright line rule. Sharpe and Savage, moreover, had a reasonable expectation of privacy in the bales, as evidenced by the careful packaging and sealing of the bales and the placing of them inside the curtained camper.]

[Cooke therefore should have obtained a warrant prior to searching the bales. Because he did not do so, the marijuana should have been suppressed on this ground, as well as on the ground that the initial seizure of the bales was unlawful.[5]]

[[4] Sharpe and Savage produced ample evidence of the virtual identity in appearance of the marijuana bales and bales of tobacco, cotton goods, and hemp.]

[[5] Another ground upon which Sharpe and Savage challenge the admission of the marijuana into evidence was the prejudicial effect of the destruction of the marijuana. Because we conclude that the marijuana should have been suppressed, we do not find it necessary to decide this question. The procedure that the government followed in destroying the evidence—without defense counsel's knowledge and without leave from the district court—nevertheless seriously concerns us, as it did the district court, and compels comment.]

[We note that the claim of prejudice in this instance is colorable. Sharpe and Savage argue that Cooke could not have smelled the tightly packaged marijuana through the closed and well-sealed camper door. They further submit that, had forty-one of the forty-three bales not been destroyed, it would have been possible to reconstruct the conditions of the stop and then to show by scientific proof the difficulty or impossibility of smelling the marijuana under those circumstances. By this means, they could have attacked Cooke's credibility

V.

Having concluded that the marijuana should have been suppressed [either]* because its discovery was the fruit of an illegal detention, [or because the warrantless search of the bales was unlawful,] we reverse Sharpe's and Savage's convictions.

REVERSED.

DONALD RUSSELL, Circuit Judge dissenting:

The defendants/appellants were plainly guilty. Unable to bribe their way out after being caught, they now ask this Court for protection and the majority would give such protection on the theory that the validity of a *Terry*-type stop is to be determined by the stop-watch and not by the totality of the circumstances of the stop. I cannot agree and accordingly dissent. My reasons for such disagreement are:

I.

The Fourth Amendment preserves "[t]he right of the people to be secure . . . against unreasonable

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and the existence of probable cause to search the truck. The destruction, of course, made the simulation impossible.]

[The better procedure would have been for the government to have petitioned the district court for an order allowing the destruction, and for the defendants to have received notice of the impending destruction and to have had access to the seized evidence prior to the destruction. Such a procedure ensures that defendants are not prejudiced by the government's handling of evidence. *See United States* v. *Heiden*, 508 F.2d 898 (9th Cir. 1974) (concurring opinion).]

*The words enclosed in brackets were "delet[ed]" from the opinion by the court of appeals when it reconsidered the case upon remand from this Court. See App. A, *supra*, 2a.

searches and seizures . . . ." The amendment does not prohibit all searches and seizures, only *unreasonable* searches and seizures. *Elkins* v. *United States*, 364 U.S. 206, 222, 80 S.Ct. 1437, 1446, 4 L.Ed. 2d 1669 (1960). In *Terry* v. *Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968), the Supreme Court defined "seizure"; "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." As a general rule "the police must, whenever practicable, obtain judicial approval of searches and seizures through the warrant procedure . . . .", *id.* at 20, 88 S.Ct. at 1879 (citation omitted), "[b]ut we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subject to the warrant procedure." *Id.*

In determining the reasonableness of the actions of the police, the *Terry* Court set forth a two part test for stopping a citizen: "Whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* For the first part of this test, the officers must be able to point to "specific and articulable facts," *id.* at 21, 88 S.Ct. at 1880, which provide some objective manifestation that the person stopped is . . . engaged in criminal activity." *United tSates* v. *Cortez*, ——U.S. ——, ——, 101 S.Ct. 690, 694, 66 L.Ed.2d 621 (1981). The second part, involving the conduct of the stop itself, depends on the totality of the circumstances: "The manner in which the seizure and search were conducted is, of course, as vital a part of the

inquiry as whether they were warranted at all. . . . We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases." 392 U.S. at 28-29, 88 S.Ct. at 1883-84. *See also id.* at 15, 19, 88 S.Ct. at 1876, 1878. Subsequent to *Terry*, a balancing test has been used by the Court in examining the reasonableness of the search and seizure. *See, e.g., Brown* v. *Texas*, 443 U.S. 47, 50-51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979); *Delaware* v. *Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *Dunaway* v. *New York*, 442 U.S. 200, 219, 99 S.Ct. 2248, 2260, 60 L.Ed.2d 824 (1979) (White, J., concurring); *Michigan* v. *Summers*, —— U.S. ——, —— n.12, 101 S.Ct. 2587, 2593 n.12, 69 L.Ed.2d 340 (1981); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108-09, 98 S.Ct. 330, 332, 54 L.Ed.2d 331 (1977); *Rawlings* v. *Kentucky*, 448 U.S. 98, 110 n.5, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 663 (1980); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-84, 95 S.Ct. 2574, 2578-52, 45 L.Ed.2d 607 (1975); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-56, 96 S.Ct. 3074, 3081-82, 49 L.Ed.2d 1116 (1976).

The Court in these cases has agreed that Agent Cooke and Patrolman Thrasher had sufficient grounds for stopping Sharpe and Savage, but the majority, rather than examine the totality of the circumstances surrounding this stop, holds that an objective criterion of any investigatory stop is that it must be brief, and that the investigatory stop here was not brief. Such objective requirement has never been recognized by the Supreme Court, and I do not agree

that this stop, under the circumstances, was not brief within the concept of a *Terry*-stop.

To be sure, the Court in *Brignoni-Ponce* wrote that the roving border patrol stop lasted " 'no more than a minute' " and required " 'a response to a brief question or two and possible production of a document evidencing a right to be in the United States.' " 422 U.S. at 880, 95 S.Ct. at 2579-80 (quoting Brief for United States at 25). And, in *Martinez-Fuerte*, the Court noted that the stops in the secondary inspection area lasted three to five minutes on the average. 428 U.S. at 547, 96 S.Ct. at 3078. These statements are, however, descriptive, not prescriptive, and are to be considered along with all other circumstances when evaluating the reasonableness of the search and seizure. Rather than creating a rule that the investigatory stop must be brief in some objective and absolute measure, I would hold that the Court should look at—as it must when looking at the grounds for the stop itself—the totality of the circumstances. *See United Sates* v. *Cortez*, —— U.S. at ——, 101 S.Ct. at 694; *United States* v. *Bull*, 565 F.2d 869 (4th Cir. 1977), *cert. denied*, 435 U.S. 946, 98 S.Ct. 1531, 55 L.Ed.2d 545 (1978); *United States* v. *Constantine*, 567 F.2d 266, 267 (4th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1492, 55 L.Ed.2d 520 (1978); *United States* v. *Dodier*, 630 F2.d 232, 234-35 (4th Cir. 1980).

Not only do I not agree to the mechanical application of the "brief stop" rule created by the majority, I also believe that the facts of this case demonstrate that the intrusion was minimal and that such delay as there was was occasioned by the defendants themselves. DEA Agent Cooke had been following the Pontiac driven by Sharpe and the truck and camper

driven by Savage for some twenty-one miles when he decided to stop the vehicles on the basis of what the majority conceded to have been "specific and articulable facts" providing some "objective manifestation . . .[of] criminal activity." Before he could do so, the two vehicles, traveling in tandem for the entire distance, turned off the main road and onto a campground road where they drove fifty-five to sixty miles per hour through the thirty-five mile per hour zone, plainly attempting to elude Agent Cooke; after completing the loop, the vehicles turned back onto the main highway. Cooke meanwhile had engaged Patrolman Thrasher to help him pursue the vehicles. As they proceeded in the middle of three south-bound lanes with the Pontiac first, followed by the truck, then Cooke, and finally Thrasher in his patrol car, Cooke asked Thrasher to pull the Pontiac and truck over.[1] Thrasher moved into the left lane and pulled alongside the Pontiac and signaled him over. Then, according to Cooke:

> The Pontiac started over to the right and as he moved into the right-hand lane, Mr. Thrasher started to move over also and the Ford pickup cut between the two vehicles, between the Highway Patrol car and the Pontiac and proceeded on down the road.

Thrasher testified that as Sharpe pulled over, Savage "continued south almost hitting my car." When the Pontiac pulled over and the truck kept going, Cooke

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[1] Cooke was not a uniformed officer, nor was he in a marked car. After stopping Sharpe, however, he placed a flashing blue light on the dash of his car. Thrasher, on the other hand, was a uniformed officer and drove a marked car. This may account for Cooke asking Thrasher to stop the cars.

decided to stay with the Pontiac while Thrasher followed the truck, finally pulling it over a half mile from the Pontiac.

This ploy by Savage in the truck is the basic cause of the delay complained of by the appellants; there is no evidence of any unnecessary delay on the part of the officers. At trial Agent Cooke testified that he asked for identification from Sharpe and Mr. Davis, a passenger in Sharpe's car, and then tried to contact Patrolman Thrasher on the radio. Apparently Thrasher was out of his car because Cooke was unable to contact him for "a few minutes." Ten minutes after Cooke stopped Sharpe, officers from the Myrtle Beach Police Department arrived to remain with Sharpe while Cooke joined Thrasher and Savage.

During the time that Cooke was with Sharpe and Davis, Thrasher had checked Savage's identification and the registration on the truck. Savage produced a Florida driver's license and a bill of sale for the truck dated the day before in the name of Pavlovich. The bill of sale was from Atlanta while the truck had South Carolina plates. Savage said that the truck belonged to a friend, that it was empty, and that he was taking it to get the shocks fixed. When Cooke arrived, Savage again maintained that the truck was empty and that he was taking it on behalf of a friend to fix the shocks. At this point Cooke stepped on the back bumper and the truck did not move. It thus was obvious that the truck was heavily loaded. The officer then smelled marijuana. The truck was opened and the marijuana discovered.

Cooke testified that once he reached Savage the whole process of checking Savage's identification, stepping on the rear bumper of the truck to see if it was heavily loaded, and smelling the marijuana took

one or two minutes. Savage was then arrested and placed in the patrol car with Thrasher,[2] while Cooke returned to the Pontiac where he arrested Sharpe and Davis. (Charges against Davis were later dismissed.) It is significant that the entire process from stop to arrest took at most thirty to forty minutes—most of the time being consumed by Cooke trying to contact Thrasher by radio and Cooke traveling between the two vehicles.[3]

This is not the custodial detention found unsupportable in *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct., 2248, 60 L.Ed.2d 824 (1979). In *Dunaway*, the police found the suspect at a neighbor's home and, without probable cause to arrest him, took him to the police

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[2] Savage offered $30,000 to Patrolman Thrasher if he would let him "hit the beach and run."

[3] The thirty to forty minute delay can only be invoked in favor of Sharpe. Cooke spent ten to fifteen minutes with Sharpe and then proceeded to join Thrasher and Savage. Once Cooke reached Savage the questioning took one or two minutes, after which Cooke smelled the marijuana. Thus Savage can complain of a delay of ten to fifteen minutes, at most.

The Model Code of Pre-Arraignment Procedure § 110.2(1) (1975) suggests that an officer may "order a person to remain in the officer's presence near such place for such period as is reasonably necessary for the accomplishment of the purposes authorized in the Subsection, but in no case for more than twenty minutes." Even under this guideline the initial stop of Sharpe was good and the stop and arrest of Savage would be good.

If we really wished to split hairs, we should subtract the time it took Savage to go the dditional half mile, and get out of the truck. This mechanical hair-splitting knows no bounds. *See* Van Graafeiland, 'The Second Circuit Review—1976-77 Term, Foreword—The Constitution and Numbers Game," 44 Brooklyn L.Rev. 747 (1978).

station for questioning. Within an hour, he had made a statement, *Id.* at 203 n.2, 99 S.Ct. at 2251. The Court noted, as one of the factors in its decision to suppress the questioning and its fruits, the fact that he "was not questioned briefly where he was found," but instead "was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room." *Id.* at 212, 99 S.Ct. at 2256. Under the circumstances, it is not difficult to see that the police in *Dunaway* had clearly crossed the rational bounds of a *Terry* stop and had arrested the suspect without probable cause. Indeed, the Supreme Court concluded that "the detention of petitioner was in important respects indistinguishable from a traditional arrest." *Id.*

In contrast, here the officers conducted a *Terry* stop "by the book." They stopped Sharpe and Savage, frisked them, and asked for identification. Agent Cooke walked to the back of the truck, stepped on the bumper, and then said he smelled marijuana. There was no abusive handling of the suspects, no prolonged questioning, and no intrusive probing into the suspect's vehicles. Furthermore, Savage had already indicated that the truck was not his and that it was empty. Thus the initial questioning of Sharpe and Savage only aroused Agent Cooke's suspicion even more—a factor we should consider. See 3 W. LaFave, *Search & Seizure*, § 9.2 at 38, 40.[4]

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[4] I think that it is clear that, *Dunaway* notwithstanding, Patrolman Thrasher might have escorted Savage back to Agent Cooke, Sharpe, and the Pontiac and still been within the proper bounds of a *Terry* stop. *See, e.g., United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977); *United States* v. *Short*, 570 F.2d 1051 (D.C. Cir. 1978); *United States* v. *Wylie*, 569

This simply does not rise to the level of the unnecessary delay criticized by the Eighth Circuit in *United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976), or by the Ninth Circuit in *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1980), both cited by the majority. In *Miller* (the police searched a house pursuant to a warrant. After finding the drugs they were searching for, the police decided to search and frisk those present including the defendant, who was a visitor in the house and had indicated a desire to leave. The search revealed a gun, and the defendant was convicted of receipt of a firearm by a previously convicted felon. The Eighth Circuit, in reversing the conviction, found that if the officers feared for their safety, the search—occurring some ten to fifteen minutes after the search began—should have been conducted when the officers first arrived. In addition, it should be noted that the search of the defendant was not related to the officers' purpose in the house, which was to search for drugs on the premises, *see Ybarra* v. *Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), nor was the defendant the owner of the house. *See Michigan* v. *Summers*, —— U.S. ——, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

In *Perez-Esparza*, the Border Patrol, acting on a tip from a reliable informant that the defendant was smuggling drugs in his car, detained the defendant for two and a half hours until DEA agents could arrive from San Diego. The Court did not, as the majority does in this case, apply any stop-watch rule

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F.2d 62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978). Surely Thrasher's keeping Savage with his vehicle was the least restrictive of permissible alternatives.

in determining the validity of the officers' action; it chose to rest its decision as I suggest we should do here, on the totality of the particular circumstances. The Ninth Circuit found that where the government had failed to justify the extreme delay, under the circumstances in the case, the defendant had been arrested without probable cause. The court specifically noted that "[w]e also do not consider whether when all officers who are competent to question a suspect are several minutes away, it is constitutionally permissible to detain a suspect briefly on less than probable cause." 609 F.2d 1284, 1287 n.2 (citing *United States* v. *O'Looney*, 544 F.2d 385 (9th Cir.), *cert. denied*, 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976)). The court then examined the difference in motivation behind taking a suspect to the police station for brief questioning because they cannot adequately examine him at the scene as in *O'Looney*,[5] and taking a suspect to the police station for an unnecessarily long interrogation which might just as easily have been conducted at the scene, a neighbor's house. *See Dunaway* v. *New York*, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). The court then continued:

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[5] In *United States* v. *O'Looney*, 544 F.2d 385 (9th Cir.) *cert. denied*, 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976), O'Looney, suspected of exporting guns to Ireland for use by the Irish Republican Army, was detained at the police station until Alcohol, Tobacco, and Firearms' agents could arrive to talk with him. The court held that "[i]t was not unreasonable to detain O'Looney temporarily at the station to await the arrival of federal officers who are more familiar with federal firearms laws and more experienced in their enforcement." *Id.* at 389.

> We do not think *Dunaway* forecloses using *Terry*-type analysis to solve such problems, when they arise in on-the-scene, unplanned, questioning. The normative distinction between *Dunaway* and *O'Looney* lies in the reasonableness of the police motivations for detaining the respective defendants.
>
> Nevertheless, we need not reach the question whether *O'Looney* rather than *Dunaway*, should govern on the facts of the case before us, because the record does not supply sufficient police justification for the detention. There is nothing in the record to demonstrate why the Border Patrol agents stationed at the San Clemente checkpoint, who may have been experienced in drug smuggling cases, could not adequately have questioned Perez-Esparza immediately after stopping him. The record is silent as to any real justification for two and one-half hour detention pending arrival of the DEA agents from San Diego, and the detention was thus unnecessary, even if not quite so egregious as the police conduct in *Dunaway*. Thus, as in *Dunaway*, the detention for custodial interrogation was impermissible on less than probable cause.

A similar conclusion was reached in *United States* v. *Richards*, 500 F.2d 1025 (9th Cir. 1974), *cert. denied*, 420 U.S. 924, 95 S.Ct. 1118, 43 L.Ed.2d 393 (1975). The court stated that "[t]he test for determining the lawfulness of such police detentions is whether under the totality of the circumstances, they are reasonable," and then found that "[a]lthough appellant's eventual detention for over an hour cannot be considered a 'brief' or 'momentary' stop, in the

particular circumstances of this case we believe that this extended detention was reasonable." *Id.* at 1029. *Cf. United States* v. *Mayes*, 524 F.2d 203 (9th Cir. 1975) (suspect held for an hour and a half while Border Patrol agents checked out his story); *United States* v. *Short*, 570 F.2d 1051, 1054-55 & n.7 (D.C. Cir. 1978) (suspect taken to scene of burglary for identification); *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977) *cert. denied*, 435 U.S. 944, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978) (suspect returned to bank for questioning).

These cases provide no support for the *per se* rule offered by the Court today; rather they clearly hold that we are entitled to look at all of the circumstances. Thus while an hour delay was not unreasonable in *O'Looney* or *Richards*, the fifteen minute delay in *Miller* was. Furthermore, *Miller* involved detention without "specific and articulable facts" while *O'Looney* and *Richards* involved *Terry* stops. We should also note that in *Michigan* v. *Summers*, —— U.S. ——, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), the defendant was detained for almost fifty minutes while the police searched his house, 49 U.S.L.W. 3674 (summary of oral argument), yet the Court passed this over by saying that "[a]lthough special circumstances or a prolonged detention, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a warrant is not such a case." —— U.S. at —— n. 21, 101 S.Ct. at 2595 n.21. *Cf. Rawlings* v. *Kentucky*, 448 U.S. 98, 107, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 (1980) (suspects detained for forty-five minutes while officers obtained a search warrant).

The only delay in this case was not associated with the questioning of Sharpe and Savage, but strictly with the need for Cooke to talk with both drivers. After following them for twenty miles, there could be no question that they were traveling together and, in view of Savage's stunt, there can be little doubt that they did not wish to be stopped together, if at all. Agent Cooke was experienced in dealing with suspected drug traffickers, and so it was not unreasonable for Patrolman Thrasher to hold Savage briefly until Cooke could join them.[6]

I would hold that because of the deliberate actions of Sharpe and Savage to avoid being stopped together, the brief detention of the pair was not unreasonable and therefore not a violation of the Fourth Amendment. There being no Fourth Amendment violation, I would not suppress the evidence discovered from the search and seizure.

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[6] Analogies to *Dunaway* and the problems attendant to custodial interrogation are thus misplaced. In *Dunaway* the Supreme Court found that stops at the border were *Terry* stops in a "special context" because of the "importance of the governmental interest at stake." 442 U.S. at 210-11 n.13, 99 S.Ct. at 2255 n.13. *See United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-81, 95 S.Ct. at 2578-80 (1975). The governmental interest at stake here is of no less importance. We can take note that while South Carolina does not have serious problems with illegal aliens, it does have a substantial problem with drug smuggling. At trial Agent Cooke testified that in the two years prior to stopping the appellants, he personally had encountered "in excess of two hundred thousand pounds" of marijuana. At least three justices have also taken note of the seriousness of the trafficking in controlled substances. *United States* v. *Mendenhall*, 446 U.S. 544, 561-62, 100 S.Ct. 1870, 1881, 64 L.Ed.F2d 497 (1980) (Powell, J., concurring).

II.

The majority also holds that the "bright line" rule of *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981) (Plurality opinion), applies to forty-three burlap-wrapped bales each weighing about sixty pounds and containing a total of 2,629 pounds of marijuana. I cannot join the Court in such a finding, nor do I read support for such a ruling in *Robbins* or *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

The Fourth Amendment protects persons from "unreasonable searches and seizures" which invade the security of "their persons, houses, papers and effects." The Supreme Court has in turn declared that a search of a person or his property, as defined in the Amendment, without a warrant issued in conformity with the requirements of the Amendment's warrant clause is normally unreasonable and invalid *per se*. However, the Court has recognized, as an exception to the warrant requirement, that a search warrant is not necessary where there is probable cause to search an automobile stopped on a highway. *Carroll* v. *United States*, 257 U.S. at 132, 153-54, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925).

A number of reasons have been given for this exception. While this exception has been justified on the "inherent mobility" of the automobile, which makes the procurement of a warrant impracticable, the exception's basis "lies in the diminished expectation of privacy which surrounds the automobile." *United States* v. *Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484, 53 L.Ed.2d 538 (1977). "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal ef-

fects." *Cardwell* v. *Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion).

Subsequent cases have followed this justification in reaching their conclusions. Thus the validity of searches of articles found in an automobile stopped on the highway has been governed by the presence or absence of a legitimate expectation of privacy in the article searched. Where there is such reasonable expectation of privacy, the Supreme Court has held that luggage which has been seized in connection with the stopping of an automobile may not be searched without a warrant. *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). The reason for such conclusion is that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Id.* at 762, 99 S.Ct. at 2592 (relying on *Chadwick*, 433 U.S. at 13, 97 S.Ct. at 2484).

In amplifying on this reason the Court said that

> a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them. Accordingly, the reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police

> from automobiles. We therefore find no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police.

Id. at 764-65, 99 S.Ct. at 2593-94. The Court, however, was at pains to caution that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not." *Id.* at 764 n.13, 99 S.Ct. at 2593-94 n.13.

During the last term of Court the issue involved in *Sanders* was re-examined in two cases. In the first case the search was invalidated, *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981) (plurality opinion); in the other, decided the same day, it was sustained. *New York* v. *Belton*, —— U.S. ——, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). Somewhat confusingly, a majority of the Supreme Court appears to have felt that the two cases should have been decided the same way, and six members of the Court were of the opinion that *Belton* was correctly decided. *See id.* at ——, 101 S.Ct. at 2865 (Stevens, J., concurring).

The majority, of course, relies on the plurality opinion in *Robbins* for support of its conclusion. However, *Robbins* is a tenuous precedent on which to plant a decision. The opinion itself was a plurality opinion, concurred in by only four members of the Court.[1] Three members of the Court vigorously dis-

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[1] *See generally*, Note, "Plurality Decisions and Judicial Decisionmaking," 94 Harv. L. Rev. 1127 (1981).

sented. Two concurred only in the judgment. Concurring in the judgment, Justice Powell remarked on the fact that views expressed in the dissent came from the Court "late in the Term" and expressed the hope that, "[s]ome future case affording an opportunity for more thorough consideration of the basic principles at risk may offer some better, if more radical, solution to the confusion that infects this benighted area of the law." —— U.S. at ——, 101 S.Ct. at 2851.[8] Perhaps this may be such a case.

In *Robbins* the Court held that a small (about the size of a cigar box), closed, opaque container discovered when the officers "opened the tailgate of the stationwagon, located a handle set flush in the deck, and lifted it up to uncover a recessed luggage compartment," *id.* at ——, 101 S.Ct. at 2844, could not be opened without a warrant. The Court, creating a "bright line" rule, decided that a warrant will ordinarily be required before a container found in the trunk of a car may be searched. It noted two exceptions to this: No warrant is required for (1) a container which, by its very nature, reveals its contents, or (2) a container, the contents of which are exposed to "plain view." *Id.* at ——, 101 S.Ct. at 2846 (relying on *Sanders*, 442 U.S. at 764 n.13, 99 S.Ct. at 2593-94). Justice Stewart noted that the first was merely a variation of the second, "since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. The same would be true, of course, if the container were

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[8] *See* Hutchison, "Felix Frankfurter and the Business of the Supreme Court, O.T. 1946, O.T. 1961," 1980 S.Ct. Rev. 143, 185-89 (1981).

transparent, or otherwise clearly revealed its contents." *Id.* at ————, 101 S.Ct. at 2846.

Neither *Sanders* nor *Robbins* supports the rule announced by the majority, that "all closed containers manifest an individual's reasonable expectation of privacy in their contents, unless a container *by its very appearance betrays an illegal purpose* or its contents are exposed to plain view." [slip op. at 972 (emphasis added)]. What the Supreme Court stated, contrary to the majority's view, was that it would be easy to identify that "some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy *because their contents can be inferred from their outward appearance*," and that

> not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment . . . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

442 U.S. at 764 n.13, 99 S.Ct. at 2593-94 n.13 (emphasis added).

If *Sanders* can be construed as holding that a container is protected only if it is "inevitably associated with the expectation of privacy," 442 U.S. at 762, 99

S.Ct. at 2592.[9] *Robbins* indicates that containers are protected unless they are inevitably not associated with an expectation of privacy. These are but alternate statements of what in effect is the same principle. Under either *Sanders* or *Robbins* Savage cannot reasonably claim to have a Fourth Amendment privacy interest in the bales of marijuana. If, as the majority notes, the bales could just as easily have contained "tobacco, cotton goods, and hemp" then it is clear that the forty-three bales—by both their nature and their number—betrayed that they did not contain personal items, but must have contained some agricultural commodity. I do not believe that even if Agent Cooke had smelled marijuana that the bales would have been protected under a privacy theory. If, as the majority assures us these bales could have contained one of several agricultural products, I do not think that, before the public could search them, they would have to eliminate every possible commodity except marijuana—no more than they would have to know whether a gun case contained a Remington, a Winchester, or a sawed-off, home-made shotgun. Nor is it of any account to argue that the bales *might* have contained personal items, since someone might just as easily place socks, underwear, and a toothbrush in a gun case or in a burglar's kit.

Thus the marijuana in this case was, I submit, in "plain view" or "otherwise clearly revealed." One controlling fact here is that the odor of the marijuana —over 2,600 pounds—was distinctive and clearly observable. That was sufficient to place the contents of

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[9] *See United States* v. *Goshorn*, 628 F.2d 697, 700-01 (1st Cir. 1980); *United States* v. *Mannino*, 635 F.2d 110, 114 (2d Cir. 1980).

the bales in "plain view." We held in *United States* v. *Haynie*, 637 F.2d 227, 233 (4th Cir. 1980), that "probable cause may be supported by the detection of distinctive odors as well as sight." In *United States* v. *Sifuentes*, 504 F.2d 845, 848 (4th Cir. 1974), we found that "[w]hen the police opened the door of the van, they saw the boxes and smelled a strong odor of marijuana. These facts combined to place the contraband in plain view, that is, obvious to the senses." It should be clear that the odor of marijuana provides sufficient grounds for probable cause. *See* Annotation, "Odor of Narcotics as Providing Probable Cause for Warrantless Search," 5 ALR 4th 681, 687-97 (1981) (collecting cases).

For these reasons I do not regard *Robbins* as analogous to this case. It is true that both cases are similar in that there was probable cause to search the interior of the stationwagon in *Robbins* and the truck in this case, but in this case, the bales of marijuana—forty-three of them weighing some sixty pounds each—were all stacked up in the truck, open to plain view and disclosing their character by their distinctive odor. The Court in *Robbins* was dealing with two packages brick-like in size, inside a closed opaque container, and stored in a closed luggage compartment. Moreover, there was no contention that the two bricks, stored in a container located in a recessed luggage compartment, were distinguished by odor; in this case, the evidence was ample that there was such odor. And this difference is understandable. There were at most some twenty or thirty pounds of marijuana in *Robbins*; there were one hundred times that in this case. I submit these factual differences would be sufficient to justify different results in the two cases.

The plurality opinion in *Robbins* did dismiss the argument that the expectation in privacy of personal effects, which is the basis for the immunity from search, is to be limited to "containers commonly used to transport 'personal effects.'" —— U.S. at ——, 101 S.Ct. at 2845. It reasoned, though, that different people used different containers to carry their "effects" such as "a closed suitcase, briefcase, portfolio, duffle bag, or box." It will be noted, though, that all the illustrations used by the plurality to support this statement relate to containers normally used to carry personal "effects" or "papers." Justice Powell in his concurring opinion draws quite a distinction between containers "such as personal baggage, . . . inevitably associated with the expectation of privacy," and others which "consistently lack such an association." —— U.S. at —— n.3, 101 S.Ct. at 2850 n.3. In dissent, Justice Blackmun perceived the same difficulty in determining what articles, under the plurality's test, could or could not be validly searched without a warrant, as had Justice Powell. He suggested that "only time will tell whether the 'test,' . . . for determining whether a package's exterior 'announce[s] its contents' will lead to a new stream of litigation." *Id.* at ——, 101 S.Ct. at 2851 (citation omitted).

Arkansas v. *Sanders* would confine the rule relied on by the majority to articles which are "inevitably associated with an expectation of privacy." That at least is the way Justice Powell, the author of the opinion in *Sanders*, indicated in his concurring opinion in *Robbins* the opinion in *Sanders* should be construed. Assuredly there was no expectation of privacy in the bulky bales in this case, whether they be regarded as bales of marijuana, or of cotton, or of cloth. Those simply are not articles in which one has some reasonable expectation of privacy. In *Robbins*, Justice

Stewart said that "[e]xpectations of privacy are established by social norms, and to fall within the second exception of the footnote in question [footnote 13 in *Sanders*], a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer." —— U.S. ——, 101 S.Ct. at 2847. Applying this to the facts in *Robbins*, he emphasized that there was no proof "that marijuana is ordinarily 'packaged this way.' " The situation here, however, is quite different from that in *Robbins*. While marijuana may not ordinarily be packaged as in *Robbins*, the transportation of marijuana in bales such as was the case here is ordinary, particularly when large quantities of marijuana are involved. "If "social norms" provide the test for determining whether articles found in an automobile enjoy an "expectation of privacy" as "repositories of personal effects," it is plain, I submit, that 2,629 pounds of marijuana, the odor of which is easily detectable, stored in a truck in forty-three bales of sixty pounds each, can hardly be considered by reasonable "social norms" to be the "repositories of personal effects." There was, in this case, no reasonable "expectation of privacy" in the marijuana and the District Court correctly so ruled.

We may add that there can be no question that Cooke had a right to open the back of the truck. Cooke smelled the marijuana from outside the truck; that gave him probable cause to search the camper. The mobility of the truck gave him the right to search it on the spot. *Chambers* v. *Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll* v. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925). The response adopted by Agent Cooke

and Patrolman Thrasher was surely reasonable. Given that the odor of marijuana gave them probable cause to search the truck, they did not have to simply shrug their shoulders and allow Savage and Sharpe to escape, *Adams* v. *Williams*, 407 U.S. 143, 145, 92 S.Ct. 1921, 1922, 32 L.Ed.2d 612 (1972), while they went off in pursuit of a warrant. And to have detained Savage and Sharpe until a warrant was secured would only have compounded the "error" (of delay) of which the majority complains.

The fact that the bales were not opened until two or three days after they were seized is not constitutionally significant. The bales did not lose the property of "plain smell—plain view" by being transported to Charleston. The odor from the bales was just as obvious in Charleston as it was along the side of the highway. The Supreme Court stated in *Chambers* v. *Maroney*, 399 U.S. at 52, 90 S.Ct. at 1981: "For constitutional purposes, we see no differences between, on the one hand, seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other hand, carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." This view from *Chambers* has been followed in other cases involving automobiles, *Cardwell* v. *Lewis*, 417 U.S. 583, 595-96, 94 S.Ct. 2464, 2471-72, 41 L.Ed.2d 325 (1974) (plurality opinion); *Colorado* v. *Bannister*, —— U.S. ——, ——, 101 S.Ct. 42, 43, 66 L.Ed.2d 1 (1980); *Cooper* v. *California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967);[10] *Texas* v. *White*, 423 U.S. 67, 68, 96

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[10] *Cooper* is an interesting case in point. The police impounded the defendant's car at the same time that they arrested him but did not search the car until a week later. Evi-

S.Ct. 304, 305, 46 L.Ed.2d 209 (1976) (per curiam), and in at least one case involving the defendant's personal effects. In *United States* v. *Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), the Court held that no search warrant was required to take the suspect's clothing from him ten hours after he had been arrested:

> Surely, the clothes could have been brushed down and vacuumed while Edwards had them on in the cell, and it was similarly reasonable to take

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dence seized during the search was introduced against him. Later cases have tried to distinguish *Cooper* on the grounds that a California statute authorized seizure of the car pending forfeiture proceedings, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 457 n.12, 91 S.Ct. 2022, 2033 n.12, 29 L.Ed.2d 564 (1971); *see* Note, "Warrantless Searches and Seizures of Automobiles," 87 Harv. L. Rev. 835, 846-47 (1974), but the language of *Cooper* indicates that the Court did not rely exclusively on that ground:

> But the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. While it is true, as the lower court said that 'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it,' [234 Cal. App. 2d 587, 598, 44 Cal. Rptr. 483, 491], the reason for and nature of the custody may constitutionally justify the search.

386 U.S. at 61, 87 S.Ct. at 790-91.

The Court then distinguished *Cooper* from *Preston* v. *United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), because the police in *Preston* searched Preston's car after he had been picked up for vagrancy; the search was not incident to the arrest.

> and examine them as the police did, particularly in view of the existence of probable cause linking the clothes to the crime. Indeed it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest.

415 U.S. at 806, 94 S.Ct. at 1238. The Court concluded by quoting *United States* v. *DeLeo*, 422 F.2d 487, 493 (1st Cir.), *cert. denied*, 397 U.S. 1037, 90 S.Ct. 1355, 25 L.Ed.2d 648 (1970) (footnote omitted): " 'While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence,' " 415 U.S. at 808-09, 94 S.Ct. at 1239-40. *See Abel* v. *United States*, 362 U.S. 217, 239, 80 S.Ct. 683, 697, 4 L.Ed.2d 668 (1960).

I am not suggesting that the search of the bales in Charleston is justified under the automobile exception. The *Carroll* exception is applicable to this case only in that the mobility of the truck and the odor of the marijuana combined to give Agent Cooke probable cause and the exigent circumstances necessary to search for the marijuana he smelled without first securing a warrant. Agent Cooke had a right to open the back of the truck which then exposed the bales. I am suggesting that seeing the bales and smelling the odor of marijuana placed the marijuana in plain view and made obtaining a warrant to search the bales superfluous.[11] "It is no answer to say that the police

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[11] Allowing the police to search a car without a warrant at the scene but requiring them to obtain a warrant before searching it at the station would ultimately encourage police

could have obtained a warrant, for '[t]he relevant test is not whether it is reasonable to produce a search warrant, but whether the search was reasonable.'" *Cooper* v. *California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967) (quoting *United States* v. *Rabinowitz*, 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed.2d 653 (1950). Having smelled the marijuana, having seen the forty-three bales, and then arresting Savage for possession of marijuana with intent to distribute and Sharpe for conspiracy to possess marijuana with intent to distribute, it would have been a gratuitous formality for Cooke to have requested a warrant.[12]

After *Arkansas* v. *Sanders* the courts may have been confused over which containers were protected and which were not, *see United States* v. *Ross*, 655 F.2d 1159, at 1173-1174 n.3 (D.C. Cir. 1981) (en banc) Tamm, J., dissenting), but even after *Robbins* no court need be so confused as to hold that a person has an expectation of privacy in bales of marijuana weighing 2,629 pounds. The "bright line" established by *Robbins* does not apply to this case. Surely we can tell the difference between a suitcase or a green garbage bag and forty-three, sixty-pound burlap bales.

I would sustain the validity of the stop and the search and affirm the judgments of conviction.

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to search the vehicle before making the arrest. Note, "Warrantless Searches and Seizures of Automobiles," 87 Harv. L. Rev. 835, 844 (1974).

[12] Since a warrant was secured before the Pontiac was searched, it is obvious that Cooke was not ignorant of the procedure and was not derelict in performing his duty. Although the good faith belief of an officer will not excuse him from getting a warrant, in this case it points to the fact that Cooke believed the marijuana was in plain view. He knew exactly what he had; the only remaining inquiry was a test of the quality of the marijuana.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5314

UNITED STATES OF AMERICA, APPELLEE

vs.

WILLIAM HARRIS SHARPE, APPELLANT

Appeal from the United States District Court for the District of South Carolina

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JUDGMENT

Pursuant to remand of the Supreme Court of the United States, this cause came on to be heard on the record from the United States District Court for the District of South Carolina, and argument previously submitted by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the majority opinion filed September 4, 1981, is readopted as modified by the opinion of this Court filed herewith; the previous decision is reaffirmed and the convictions reversed.

[Filed Jun. 30, 1983]

/s/ William K. Slate II
Clerk

[SEAL]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5315

UNITED STATES OF AMERICA, APPELLEE

vs.

DONALD DAVIS SAVAGE, APPELLANT

Appeal from the United States District Court
for the District of South Carolina

JUDGMENT

Pursuant to remand of the Supreme Court of the United States, this cause came on to be heard on the record from the United States District Court for the District of South Carolina, and argument previously submitted by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the majority opinion filed September 4, 1981, is readopted as modified by the opinion of this Court filed herewith; the previous decision is reaffirmed and the convictions reversed.

[Filed Jun. 30, 1983]

/s/ William K. Slate II
Clerk

[SEAL]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 417048 84

Office-Supreme Court, U.S.
FILED
DEC 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-529

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Petitioner,

V.

WILLIAM HARRIS SHARPE AND
DONALD DAVIS SAVAGE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR SHARPE AND SAVAGE IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether a subsequent petition for certiorari, after the initial petition had been granted but resulted in an unfavorable resolution for petitioner, is barred by the principle of the finality of judicial proceedings?

(2) Whether the length of the detentions of Sharpe and Savage effectively transformed them into *de facto* arrests without basis or probable cause, making them unreasonable seizures under the Fourth Amendment?

(3) Whether evidence seized as a result of the unlawful detentions should be suppressed?

(4) Whether the questions presented by the petition are worthy of certiorari, since their resolution in favor of petitioner would not be dispositive of this case?

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IN THE

Supreme Court of the United States

October Term, 1983

No. 83-529

UNITED STATES OF AMERICA,
Petitioner,

V.

WILLIAM HARRIS SHARPE AND
DONALD DAVIS SAVAGE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR SHARPE AND SAVAGE IN OPPOSITION

The Respondents respectfully request that the United States' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit be denied

OPINIONS BELOW

The opinion of the Court of Appeals subsequent to this Court's remand (Pet. App. A, 1a-13a) is reported at 712 F.2d 65. This Court's order granting the prior petition for a writ of certiorari, vacating the prior judgments of the Court of Appeals, and remanding the case to the Court of Appeals, is reported at 457 U.S. 1127. The initial opinion of the Court of Appeals (Pet. App. B, 14a-51a) is reported at 660 F.2d 967. The District Court issued no written opinion.

JURISDICTION

The judgments of the Court of Appeals (Pet. App. C, 52a and 53a) on remand from this Court were entered on June 30, 1983. On August 22, 1983, Justice Brennan extended the time in which the United States could file a Petition for a Writ of Certiorari to and including September 28, 1983. Respondents were served with a copy of the Petition on October 10, 1983. On November 9, 1983, Respondents filed a letter brief in opposition with the Clerk of this Court. On November 21, 1983, Respondents were directed to file a formal response by December 21, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of South Carolina, respondents were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In a 2-1 decision the Court of Appeals reversed respondents' convictions.

1. The evidence showed that on June 9, 1978, DEA Agent Luther Cooke was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina, an area under surveillance by law enforcement authorities for suspected drug trafficking. (Tr. 35-36) At approximately 6:30 A.M., Cooke observed a blue pickup truck with an attached camper shell travelling in tandem with a blue Pontiac. Observing that the truck was riding low in the rear and that a quilted material covered the rear window of the camper, Cooke proceeded to follow the vehicles south. (Tr. 39-41) After approximately twenty miles, Cooke determined that he would stop the vehicles and he dispatched a request for aid, to which

South Carolina Highway Patrolman Thrasher responded. (Tr. 44-47)

Some time after Thrasher joined the procession, the Pontiac and the truck turned onto a loop road through a campground. At no time prior to the turn had the occupants of the truck or vehicle signalled to or communicated with each other, and they did not attempt to do so as they drove the loop road through the campground. Thrasher testified that the truck and Pontiac were travelling between 55 and 60 MPH, although the posted speed was 35 MPH. (Tr. 52) At the end of the loop, the vehicles turned back onto the main coastal highway and again proceeded south toward Myrtle Beach.

Shortly thereafter, Cooke stopped the Pontiac and Thrasher stopped the truck. Cooke approached the Pontiac's occupants and identified himself. He requested and received an operator's license from the driver, Sharpe; the license was in the name of Raymond J. Pavlovich. (Tr. 54) Sharpe and his passenger Davis (the charges against whom were later dropped) were not told why they had been stopped. Several minutes later, Cooke radioed the local police for assistance, and two officers from the Myrtle Beach Police Department eventually arrived, in uniform and armed. (Tr. 54-57, 100-101) Asking the local police to "maintain the situation," Cooke turned custody of Sharpe and Davis over to them and left to join Thrasher, who was with the truck a few blocks further south.

After stopping the truck, Thrasher had approached it with his revolver drawn, had ordered the driver to get out of the truck and to assume a spread-eagled position against its side, and had searched him. At Thrasher's request, the driver had produced a Florida license identi-

fying him as William Savage and a bill of sale for the truck in the name of Pavlovich. Thrasher gave Savage no reason for the stop but indicated that he would hold him there until Cooke arrived. Savage had then requested the return of his license and permission to leave. Thrasher had refused to return the license and told Savage that he was not free to leave, as he was under custodial arrest, and that he could detain Savage on speeding charges if necessary. (Tr. 146-150, 163-165)

When Cooke arrived approximately fifteen minutes after the truck had been stopped, he identified himself as a DEA agent, and Thrasher handed him Savage's license and the bill of sale. Cooke twice requested that he be allowed to search the camper and was refused both times. Cooke then stepped onto the rear bumper and observed that it did not lower appreciably. He leaned against the rear of the camper, breathed deeply, and announced that he detected the smell of marijuana. Cooke removed the keys from the ignition, unlocked the camper and searched it, finding a number of highly compressed, well-wrapped burlap bales but no marijuana residue.

After the search of the camper, Cooke placed Savage under arrest and left him in Thrasher's custody while he returned to the Pontiac, where he placed Sharpe under arrest. By the time Sharpe was arrested, approximately thirty to forty minutes had elapsed since Cooke had first stopped the Pontiac.

Cooke then assembled the various parties and vehicles and led them to the Myrtle Beach police station. That evening the truck was driven to the Federal Building in Charleston, and two or three days later, Cooke supervised the unloading of the truck, which contained forty-three intact bales. Eight randomly selected bales were then

searched, and analysis of samples taken from them revealed that the bales contained marijuana. No search warrant was obtained prior to the unloading and analyzing of the bales and their contents. Cooke retained two of the eight bales and stored them in a vault in his office; the rest were destroyed by fire, under the direction of the Assistant United States Attorney and without permission of the district court. (Tr. 221-222, 151-154)

2. On appeal, a panel of the Fourth Circuit Court of Appeals reversed Respondents' convictions in a 2-1 decision. (Pet. App. B, 14a-51a). The circuit court interpreted this Court's cases concerning investigatory field stops of vehicles to require a reasonable suspicion by the officer of illegality supported by articulable and objective facts, and that the stop must be brief. (Pet. App. B, at 18a-19a). The Court assumed "without deciding that Cooke had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marijuana trafficking" when the officers stopped the vehicles that Respondents were driving. (*Id.* at 19a). However, the Court concluded that the stops failed to meet the requirement of brevity. (*Ibid.*) The Court then noted that it was the transitory nature of the stop that justifies the elimination of the probable cause requirement, recognizing that when this Court transposed the stop and frisk rationale of *Terry v. Ohio*, 392 U.S. 1 (1968), to the vehicle stop situation, the Court "was careful to emphasize the de minimus nature of such stops in justifying the intrusion under the Fourth Amendment." (Pet. App. B, at 19a). Thus, the Court found that Sharpe was detained without probable cause for arrest for 30-40 minutes before Cooke returned to the Pontiac to arrest him, and Savage was held under custodial arrest without probable cause by Thrasher for at least 15 minutes before being questioned and finally ar-

rested by Cooke. "Indeed, the length of the detentions effectively transformed them into de facto arrests without basis and probable cause," thereby converting the stops into unreasonable seizures under the Fourth Amendment. (Pet. App. B, at 20a).

Then, obtaining guidance from *Dunaway v. New York*, 442 U.S. 201 (1979), the appeals court found that the detentions of Sharpe and Savage were like that detention in *Dunaway*, because the lengthy detentions of Respondents by the law enforcement officers, who had no intention of allowing Respondents to leave custody, closely resembled traditional arrests. Therefore, since probable cause did not exist prior to the detentions, the Court viewed them as illegal seizures under the Fourth and Fourteenth Amendments. (Pet. App. B, at 20a-21a).

Having determined that Sharpe and Savage were illegally detained, the Court inquired into whether the bales of marijuana that Cooke uncovered during the search of the truck should have been suppressed as fruits of the illegality under *Wong Sun v. United States*, 371 U.S. 471 (1963). Recognizing that *Wong Sun* directed a court to inquire, pursuant to a proper "fruits" analysis, "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint" (citing *Wong Sun* at 488), the Court held that the officer would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck, had Savage not been detained for longer than constitutionally permissible under an investigatory stop. (Pet. App. B, at 22a).

The Court also rejected Petitioner's argument that

Cooke's olfactory find supplied the probable cause, holding that Cooke's smelling of the marijuana was so intertwined with the circumstances of the unlawful detentions that it could not have purged the illegal taint of those detentions and could, therefore, not have served as probable cause for a search. (*Ibid.*)

As an alternative ground for mandating suppression of the fruits of the unlawful detention, the Court of Appeals held that the officer's warrantless search of the burlap-wrapped marijuana bales discovered in the pick-up truck violated the Fourth Amendment. (Pet. App. B, 23a-25a). The Court concluded that under the analysis in *Robbins v. California*, 453 U.S. 420 (1981), the warrantless search of the bales was impermissible.

Because of the resolution of the issues on appeal, the Court did not address the questions of (1) whether the District Court properly refused to suppress Sharpe's license and the bill of sale for the truck; and (2) whether the marijuana was subject to suppression on the alternative ground that Respondents suffered prejudice from the destruction of the marijuana without notice to them. (Pet. App. B, at 22a and 25a).

Circuit Judge Russell dissented, stating that a balancing test was necessary in order to examine the reasonableness of the search and seizure. He also would have found that the intrusion in this case was minimal and that the delay was occasioned by the Respondents themselves. (Pet. App. B, 26a-51a).

3. After rehearing *en banc* was denied by an equally divided court (See No. 81-1736, Petitioner's App. 39a-40a), the United States petitioned for certiorari in this Court. Questions presented were (1) Whether law enforcement officers may detain an individual suspected of

criminal activity for a limited but more than momentary period in order to pursue the investigation; (2) Whether the marijuana seized from the vehicle was suppressible as a fruit of the detentions; and (3) Whether the constitution required a warrant prior to the searching of the burlap bales in the rear of the truck. This Court granted certiorari on June 21, 1982, vacated the judgment of the Fourth Circuit, and remanded the case to the Fourth Circuit for further consideration in light of *United States v. Ross*, 456 U.S. 798 (1982). *United States v. Sharpe*, 457 U.S. 1127 (1982). Justice Stephens, joined by Justices Brennan and Marshall dissented because *United States v. Ross* shed no light on the proper disposition of whether the warrantless search itself was legitimate. 457 U.S. at 1128.

4. On remand, the Court of Appeals again reversed the convictions 2-1. (Pet. App. A, 1a-13a). The majority concluded that by virtue of *Ross*, the alternative basis for the previous decision was no longer valid. (Pet. App. A at 2a). However, the majority found that *Ross* did not adversely affect the primary holding that the initial stop of the vehicles and the lengthy detention of the respondents constituted illegal seizures. The majority therefore readopted the original majority opinion as modified and again reversed the convictions. (*Ibid.* at 2a-3a).

Judge Russell again dissented, concluding that this Court's remand required consideration of both alternative grounds of decision. He argued that the decision of the majority was inconsistent with *Michigan v. Summers*, 452 U.S. 692 (1981), and failed to take into account respondent's responsibility for the length of the detention. (Pet. App. A, 8a-9a). Prior to the entry of the Court of Appeals' judgment on remand, the opinions were circu-

lated to the full Court. Suggestion for *sua sponte en banc* reconsideration was made by a member of the Court but failed to garner the necessary majority vote. However, the opinions on remand reflect the full Court voted 5-4 to affirm the panel opinion (Pet. App. A, 3a, 4a, 13a).

REASONS FOR DENYING THE PETITION

1. In its original petition in this case, No. 81-1736, the United States sought review on both *Terry v. Ohio*, 392 U.S. 1 (1968), and the *Robbins v. California*, 453 U.S. 420 (1981)/*United States v. Ross*, 456 U.S. 798 (1982), issues. This Court granted the petition, and remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Ross*. The Court's explicit order was followed by the lower court, which readopted the original opinion, once modified to be consistent with the principles enunciated in *Ross*. *Sharpe v. United States*, 712 F.2d 65 (4th Cir. 1983).

While an initial denial of certiorari has no precedental or preclusive effect on subsequent petitions, *Hathorn v. Lovorn*, 475 U.S. 255, 262, n. 11 (1982), citing *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n. 1 (1973), the appellate history of this case presents a different posture. Since this Court granted the government's original petition on both issues, and remanded only so that the Fourth Circuit could correct its opinion to conform with *Ross*, this second petition amounts to an attempt to reargue that which is already the "law of the case". It is improbable that this Court granted certiorari in No. 81-1736 and disapproved of the Fourth Circuit's handling of the *Terry* issue through a silent and implicit reprimand, as Judge Russell concluded in his dissent. See *Sharpe v. United States, supra*, 712 F.2d at

66-67 (Russell, J., dissenting). Rather, the Fourth Circuit was instructed to review its alternative decision in light of *Ross*, because the panel opinion concerning the "bright line" in Fourth Amendment container cases was no longer valid. Thus, a second petition after certiorari had been granted previously amounts to an attempt by petitioner for a "second bite at the apple"; and thus, is inconsistent with the important principle of the finality of judicial proceedings.

2. In addition, as noted in respondent's opposition to the first petition, the court below did not hold, contrary to petitioner's contention (at Pet. 11), that absent probable cause, investigatory stops that are more than momentary are per se unreasonable under the Fourth Amendment, without regard to the facts or circumstances that affect the duration of the detention.

Rather, the Court held that the lengthy detentions of Sharpe and Savage by law enforcement officers, who had no intention of allowing them to leave custody, closely resembled traditional arrests and, not being grounded on probable cause, were unconstitutional seizures. Review of the opinions below establishes not a *per se* rule, but that the thirty to forty minute "de facto" arrest of Sharpe and the fifteen to twenty minute "de facto" arrest of Savage, both without probable cause, transformed them into "traditional" arrests. Pet. App. B; *Sharpe v. United States*, 660 F.2d 967, 970 (4th Cir. 1981).

(a) *Michigan v. Summers*, 452 U.S. 692 (1981), cited by petitioner in support for its position, is inapposite to the instant case. Factually, *Summers* offers little guidance to this case, since it concerned detention of an occupant of the premises being searched pursuant to a *search warrant*. Significantly, the *Summers* Court compared the

intrusion upon Summers, as opposed to that intrusion which would obtain upon a formal arrest, and held that "of prime importance" was the fact that the police had obtained a warrant to search Summers' house for contraband. "A neutral and detached magistrate . . . had authorized a substantial invasion of the privacy of the persons who resided there." 452 U.S. at 701. Moreover, this Court noted that the type of detention imposed upon Summers was not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officer sought normally would be obtained through the search and not through the detention.

Contrasted to the instant case is the fact that respondent Sharpe was pulled over and detained without ever being informed of the nature of the detention or the reason for it. Likewise, respondent Savage was detained by Officer Thrasher for fifteen to twenty minutes prior to the arrival of Agent Cooke. Upon Cooke's arrival, he twice requested that he be allowed to search the camper, and was refused both times. It was at that point that Cooke approached the rear of the truck to perform his olfactory investigation. Thus, the opposite from *Summers* occurred here; the officers used the detention to gain information to justify the search, rather than the detention merely being incidental to a valid right to search.

In conclusion, *Michigan v. Summers* stands for the proposition that for Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it limited authority to detain the occupants of the premises while a proper search is conducted. 452 U.S. at 705. In fact, the Court rejected the "multi-factor balancing test of 'reasonable police conduct

under the circumstances' " to cover all seizures that do not amount to technical arrests, which Justice Russell and petitioner urge upon the Court. Significantly, the *Summers* Court cited from *Dunaway v. New York*, 442 U.S. 200, 213 (1979), where it was noted:

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when the balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime."

(b) Thus, although the court below did not issue a *per se* rule concerning the time of any investigatory stop, it concluded that the detentions of Sharpe and Savage violated the "brevity" prong of this Court's cases concerning seizures based on less than probable cause. Its conclusion was perfectly consistent with these precedents. See *United States v. Cortez*, 449 U.S. 411 (1981) (the Fourth Amendment applies to seizures of the person, including *brief, investigatory stops* such as the stop of the vehicle here); *Reid v. Georgia*, 448 U.S. 438, 440 (1980); *United States v. Brignoni-Ponce*, 22 U.S. 873, 878 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968). (emphasis supplied).

Recently, in *United States v. Place*, ____ U.S. ____, 103 S.Ct. 2637 (1983), this Court held that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage *briefly*, and to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. Thus, the Court concluded in *Place* that the length of the de-

tention of respondent's luggage alone precluded the conclusion that the seizure was reasonable in the absence of probable cause, stating that although the reasonableness of seizures longer than the momentary ones in *Terry*, *Adams v. Williams*, 407 U.S. 143 (1972), and *Brignoni-Ponce* had been recognized, the brevity of the invasion of the individual's Fourth Amendment interest is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. *United States v. Place*, *supra*, 103 S.Ct. at 2645.

Moreover, in *Florida v. Royer*, ___ U.S. ___, 103 S.Ct. 1319 (1983), the Court held that *Terry* and its progeny created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be investigative yet violative of the Fourth Amendment absent probable cause. In the name of investigation, a person who is no more than suspected of criminal activity cannot be subjected to a full search of his person or of his automobile or other effects. "Nor may the police seek to verify their suspicions by means that approach the conditions of arrest." *Florida v. Royer*, *supra*, 103 S.Ct. at 1325.

Finally, the *Royer* Court concluded that "an investigative detention must be *temporary* and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative method employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.*

This Court's analysis in *Summers* and the other cases demonstrates that a law enforcement officer making a valid *Terry* stop lawfully may detain a suspect for more than a brief moment, if such action is reasonably required

in order to pursue a legitimate avenue of investigation. Here, however, respondents were detained and not told the reason for their detention. Under the facts of this case, Sharpe's detention for thirty-five to forty minutes and Savage's detention for fifteen to twenty minutes were not reasonable under these circumstances.

(c) In addition, it is clear that the court below considered the totality of the circumstances which petitioner urges. See *United States v. Cortez*, *supra*, at 417-418; *Florida v. Royer*, *supra*. The Court did not find the delay attributable to the evasive action taken by respondent Savage. The petitioner's conclusion to this effect has no basis in fact, and is contrary to the factual findings of the court below. Rather, the lengthy detention was instead due to the officer's conduct: (1) the officers followed respondents for over 21 miles before deciding to stop the vehicles; (2) the officers were unsuccessful in making radio communication once the vehicles were stopped; (3) it took the Myrtle Beach police officers over ten minutes to appear on the scene; (4) although *several* officers and agents were surrounding each vehicle, not one officer could tell the drivers why they were being detained; (5) there is nothing in the testimony that shows any "ploy" by Savage to evade officers; and (6) the lengthy delay was caused by Agent Cooke's failure to communicate with the several officers assisting him and by all the officers' failure to follow proper procedure.

Since the court below carefully considered the facts of this case and correctly applied the facts to the current United States Supreme Court law, the petition of the United States should be denied.

3. The court below was correct in its application of the exclusionary rule. Agent Cooke admitted that the

stop of Sharpe and Savage was based on the appearance of the pick-up truck and was a profile stop. Thrasher testified that he knew in his mind that the truck they were following contained marijuana.

Once the stop was made, Sharpe was not questioned about the suspicions but yet was not free to go on his way. He was placed in a police car; his license had been seized and he was detained for approximately forty minutes. Thus, the court below correctly determined that this was a custodial arrest without probable cause.

If illegal detention for an extended period of time, without prior probable cause, is not deterred by implementation of the exclusionary rule, then police officers will be judicially licensed to illegally detain suspects, without probable cause for extended periods of time, until the will of the suspects succumbs to the coercive effect of illegal police action. Thus, all fruits of the illegal detention, including the Georgia drivers license in the name of Raymond J. Pavlovich (which is the only evidence which connects Sharpe to the Ford truck), and the marijuana, must be suppressed.

Brown v. Illinois, 422 U.S. 590 (1975), identified several factors that should be considered in determining whether a confession has been purged by the taint of the illegal arrest: (1) the temporal proximity of the arrest and the confession; (2) presence of intervening circumstances; and (3) particularly, the purpose and flagrancy of the official misconduct. 422 U.S. at 603-604. See also *Taylor v. Alabama*, ____ U.S. ____, 102 S.Ct. 2664, 2667 (1982). These factors equally are applicable to this illegal detention/illegal search fact situation. Temporally, Sharpe was detained unlawfully, while Agent Cooke went about seeking to satisfy his suspicions about the contents of the

truck. No intervening circumstances occurred except for the unlawful detention of respondent Savage. Third, the purpose of the lengthy and unlawful detentions of respondents was so that the officers could get a look inside the camper shell of the truck. The delayed detention of Sharpe by Cooke, in tandem with the delayed detention of Savage by Thrasher prior to interrogation by Cooke, represents flagrant practices by the officers. If the stop of Savage had been more than just a mere pretext to see what was in the camper (such as the traffic violation which Thrasher noted), then these legitimate concerns could have been expeditiously carried out while Thrasher awaited Cooke's arrival. Instead, Savage was just held.

Moreover, the United States has argued in both of its petitions that the discovery of the marijuana following Savage's detention "invaded no right of privacy of person . . . which would entitle [Sharpe] to object to its use at his trial," citing *Wong Sun v. United States*, *supra*, 371 U.S. at 492. However, this "standing" argument should not be raised for the first time in this Court. *Steagald v. United States*, 451 U.S. 204 (1981).

As to respondent Savage, the argument that the marijuana was not a fruit of an unlawful detention is mere sophistry. First, Savage was held for fifteen minutes with no reason explained to him prior to the arrival of Agent Cooke. Then, upon Agent Cooke's arrival, Cooke unsuccessfully attempted to get Savage to consent to a search to the back of the truck. Failing that, Agent Cooke put his olfactory senses to work. Thus, it was this piercing conduct, beyond a check for identification and perhaps a check for weapons, which transformed this encounter/detention into what traditionally has been viewed as a probable cause-requiring arrest. Therefore,

the length of the detention and the scope of the inquiry certainly lead to the discovery of the marijuana.

4. In addition, the Court should deny the petition for certiorari because a grant of the petition and a reversal of the Court of Appeals would not be dispositive of this case. Other meritorious issues were raised but not reached by the Fourth Circuit because of the reversal of respondent's convictions on two grounds. These additional issues include: (1) Whether the facts known to the police authorities at the time they stopped respondents were tenuous and did not provide sufficiently articulable suspicion to justify a stop; and (2) whether the Court erred when it denied respondents' motion to dismiss the indictment due to the destruction of marijuana by the DEA in the absence of notification to defense counsel, and in the absence of a court order. As to the second issue, the Court of Appeals went so far as to say:

> Another ground upon which Sharpe and Savage challenge the admission of the marijuana into evidence was the prejudicial effect of the destruction of the marijuana. Because we conclude that the marijuana should have been suppressed, we do not find it necessary to decide this question. The procedure that the government followed in destroying the evidence —without defense counsel's knowledge and without leave from the district court—nevertheless seriously concerns us . . . .

(Pet. App. B, 25a, n. 5.)

CONCLUSION

For all the above and foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this date served the following counsel, with a copy of the within and foregoing Brief in Opposition to Petition for Writ of Certiorari, by depositing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to insure delivery:

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This the _____ day of December, 1983.

MARK J. KADISH

Office - Supreme Court, U.S.
FILED
JAN 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-529

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-529

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. The court of appeals' initial decision reversing respondents' convictions and suppressing the marijuana seized from the pickup truck rested on two grounds, each independently sufficient to support the judgment. The court ruled (1) that the discovery of the marijuana was the fruit of unlawful detentions of respondents, and (2) that the warrantless search of the marijuana bales was unlawful. Thereafter, this Court granted certiorari, vacated the court of appeals' judgment, and remanded the case to that court for further consideration in light of *United States* v. *Ross*, 456 U.S. 798 (1982). Respondents argue (Br. in Opp. 9-10) that, because *Ross* is relevant only to the warrantless search issue, the remand order must be read as an implicit affirmance of the court of appeals' decision on the detention and fruits issues. It therefore follows, according to respondents, that our attempt to obtain review of those issues by way of the present petition for certiorari is barred by the "law of the

case" doctrine. This argument is frivolous. If the Court had indeed determined the merits of the present issues in respondents' favor, it would have been entirely pointless to have granted the petition and remanded the case.[1]

2. Respondents contend (Br. in Opp. 10) that the court of appeals' ruling on the detention issue turned not merely on the duration of the detentions, but also on the fact that respondents were not free to leave, a fact that, respondents suggest, transformed their detentions into traditional arrests requiring probable cause.

However, an investigative stop regulated by the Fourth Amendment by definition involves the suspect's involuntary detention by police. In *Terry* v. *Ohio,* 392 U.S. 1 (1968), the Court recognized the principle that certain police conduct may constitute a "seizure" under the Fourth Amendment yet not require probable cause. The Court left no doubt that such a "seizure" involves some restraint on the freedom of the individual to walk away. *Id.* at 16. See *United States* v. *Place,* No. 81-1617 (June 20, 1983), slip op. 6. Indeed, as this Court has recently observed, when an individual is free to leave an encounter with a police officer, that encounter is not a "seizure" that implicates the protections of the Fourth Amendment at all. See *Florida* v. *Royer,* No. 80-2146 (Mar. 23, 1983), slip op. 5-6 (plurality opinion); *id.* at 3-4 (Brennan, J., concurring); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting); *United States* v. *Mendenhall,* 446 U.S. 544, 552-555 (1980) (opinion of Stewart, J.).

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[1]In his dissent on remand, Judge Russell drew precisely the opposite conclusion, *i.e.*, that the Court's remand made sense only if it implicitly decided the detention issue in the government's favor (Pet. App. 5a-13a). While we do not press such a contention here, it is certainly far more logical than respondents' argument.

Thus, contrary to respondents' suggestion, the fact that an individual's freedom to leave during an investigative detention of limited duration may be restrained in the same manner as it would be if he were arrested does not imply that the detention requires probable cause. As one leading authority has stated:

> The typical stopping for investigation cannot be viewed as anything but a complete restriction on liberty of movement for a time, and if investigation uncovers added facts bringing about an arrest, the early stages of the arrest will not involve any new restraint of significance * * *. A stopping for investigation is not a lesser intrusion, as compared to arrest, because the restriction on movement is incomplete, but rather because it is brief when compared with arrest, which (as emphasized in *Terry*) "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows."

3 W. LaFave, *Search and Seizure* § 9.2, at 29-30 (1978).

In short, the fact that respondents' detention was involuntary did not transform the stops into arrests. Furthermore, because involuntariness is inherent in the concept of a forcible investigatory stop that is subject to the Fourth Amendment, the detainee's inability to leave cannot possibly be a factor to be taken into account in determining whether the detention amounted to an unlawful arrest. Thus, the dispositive question here is not whether respondents were free to leave (they clearly were not), but whether their seizure was reasonable under the Fourth Amendment. The court of appeals held that the seizure was unreasonable solely by virtue of its duration, without regard to any of the surrounding circumstances; the court chose to disregard even the fact that the length of detention is primarily attributable to respondents' own actions. It is our submission

that this was error because, as this Court's Fourth Amendment decisions confirm, the determination of the reasonableness of a particular law enforcement action requires a consideration of all the relevant circumstances. See, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981).

3. Respondents contend (Br. in Opp. 14) that the delay between the initial stops and the formal arrests is attributable to the officers' actions rather than to respondents' own evasive maneuvers when directed by Officer Thrasher to pull over. As Judge Russell stated in dissent, however (Pet. App. 31a), the "ploy by [respondent] Savage in the truck is the basic cause of the delay complained of by [respondents]; there is no evidence of any unnecessary delay on the part of the officers." These maneuvers were, alone, responsible for any time lapse resulting from Agent Cooke's efforts to conduct his investigation of both respondents at locations half a mile apart. Thus, contrary to respondents' contention, the length of the detention was not at all the result of the officers' actions. Instead, the officers' actions, including Agent Cooke's attempts to contact Officer Thrasher by radio and his awaiting the arrival of local police to maintain the status quo at the site of the first stop, were directly attributable to the fact that respondents were stopped at separate locations. Although the majority below found that the overall delay transformed the stops into unlawful arrests, it never even suggested that these actions or any of the other factors enumerated by respondents constituted unreasonable conduct.[2]

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[2]The other factors cited by respondents, Agent Cooke's 21 mile surveillance of their vehicles before stopping them and the alleged failure of the police to explain the reason for the stop, did not in any way contribute to extending the detention of respondents. The lengthy pre-stop surveillance served to assure a sufficient factual predicate for the stops; indeed, Agent Cooke made most of the observations that formed the basis of his suspicion after he had followed respondents'

4. Respondents complain (Br. in Opp. 16) that the government may not challenge Sharpe's "standing" to suppress the marijuana discovered in the pickup truck because it did not raise this "standing" argument in the lower courts. Respondents fail to perceive, however, that this "standing" argument is simply one element of our argument on the fruits issue. The fruits issue itself is properly presented in the petition because the court of appeals expressly addressed and decided it in holding that the marijuana had to be suppressed as a consequence of respondents' assertedly unlawful detentions (Pet. App. 21a-22a). Thus, this is not a case in which the issue presented was "neither raised before *nor considered by* the Court of Appeals * * *." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (emphasis added). Cf. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). Moreover, the "standing" element of our fruits argument is properly presented because the court of appeals did not specify whether suppression of the marijuana as to Sharpe was based on the assertedly unlawful detention of Sharpe or that of Savage; the arguments in our petition on the fruits issue merely canvass all of the possible bases for the court of appeals' erroneous holding.

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vehicles for some distance (I Tr. 45-50, 85). There is, of course, no constitutional right to be detained at the precise moment a legally sufficient basis for detention is established. See, *e.g.*, *United States* v. *Davis*, 646 F.2d 1298, 1302 (8th Cir.), cert. denied, 454 U.S. 868 (1981); see also *United States* v. *Lovasco*, 431 U.S. 783, 791 (1977); *United States* v. *Watson*, 423 U.S. 411, 431 (1976) (Powell, J., concurring). Furthermore, while respondents were not expressly informed that they had been stopped because they were suspected of transporting marijuana, this was the only logical implication of Officer Thrasher's statement to Savage that Agent Cooke, whom Thrasher identified as a DEA agent, would be there shortly; of Agent Cooke's identification of himself to both respondents as a DEA agent; and of Cooke's statement to Savage that he believed there was marijuana in the truck (I Tr. 54, 57, 105, 148-149).

For the foregoing reasons and those presented in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JANUARY 1984

DOJ-1984-01

Office-Supreme Court, U.S.
FILED
AUG 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-529

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BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether law enforcement officers may temporarily detain an individual reasonably suspected of criminal activity for the period—brief, but exceeding a few minutes—reasonably necessary to pursue a circumscribed investigation of the suspected criminal activity.

2. Whether, assuming that respondents were unlawfully detained in violation of the Fourth Amendment, the illegality mandates suppression as to respondent Sharpe of a large shipment of marijuana discovered in respondent Savage's pickup truck.

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OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-13a) is reported at 712 F.2d 65. The initial opinion of the court of appeals (Pet. App. 14a-51a) is reported at 660 F.2d 967. The district court's oral rulings on respondents' suppression motions (J.A. 43-45) are not reported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 52a, 53a) were entered on June 30, 1983. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 28, 1983. The petition was filed on Septem-

ber 27, 1983, and was granted on June 18, 1984 (J.A. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a bench trial in the United States District Court for the District of South Carolina, respondents were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 842(a)(1). Respondent Savage was sentenced to eight years' imprisonment, to be followed by a ten-year special parole term. Respondent Sharpe was sentenced to five years' imprisonment, to be followed by a ten-year special parole term. A divided panel of the court of appeals reversed respondents' convictions. On our petition for a writ of certiorari (No. 81-1736), the judgment of the court of appeals was vacated and the case was remanded for further consideration. 457 U.S. 1127. On remand the court of appeals, again divided, modified its opinion but once again reversed respondents' convictions.[1]

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[1] We understand that respondent Sharpe has become a fugitive; this fact, however, does not affect the Court's jurisdiction over Sharpe's case. The government has sought review of the court of appeals' decision reversing respondents'

1. Prior to trial, respondents moved to suppress a large shipment of marijuana found in bales seized from a pickup truck that had been operated by respondent Savage (J.A. 5-8). The evidence showed that on the morning of June 9, 1978, DEA Agent Luther Cooke, who had had considerable experience in drug enforcement matters,[2] was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina, an area under surveillance by law enforcement authorities for suspected drug trafficking (J.A. 9-10). At approximately 6:30 a.m., Agent Cooke noticed a blue pickup truck outfitted with a camper shell travelling in tandem with a blue Pontiac. It was later ascertained that the pickup truck was operated by respondent Savage and that the Pontiac (which also contained a male passenger) was operated by respondent Sharpe. Agent Cooke knew from experience that pickup trucks with camper tops are often used to transport marijuana after it has been unloaded from boats. The agent noticed that the pickup truck driven by Savage was riding low in the rear and appeared overloaded; in addition, the rear window of the camper appeared to be covered from the inside with a quilted material. J.A. 9-10, 11-12.

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convictions. Reversal of that decision would reinstate the judgments of conviction and sentences entered by the district court and would subject respondent Sharpe to arrest and imprisonment on his conviction. See *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 1-3 n.2.

[2] Agent Cooke had worked as a narcotics agent since 1966 and had investigated more than 700 drug cases, including major marijuana smuggling cases, in the course of his career (J.A. 9).

As he followed the pickup, Agent Cooke also observed that when the truck hit a bump or turned a corner it did not bounce or sway, a further indication that it was carrying a heavy load. Cooke drove along behind the two vehicles for approximately 21 miles. When the respondents reached the vicinity of Myrtle Beach, South Carolina, the agent pulled up alongside the pickup truck and noticed that the side windows of the camper top were also covered with a quilted material, hung in a horizontal position,[3] and that the vehicle appeared to be heavily loaded in the rear. Agent Cooke radioed the State Highway Patrol for assistance. J.A. 13-15.

Officer Kenneth Thrasher, in a marked patrol car, answered Cooke's request for assistance. After Thrasher caught up with Cooke, the two officers, in their separate vehicles, followed respondents as the Pontiac and pickup truck turned onto a side road that ran through a campground and looped back to the highway. Although the speed limit on the road was 35 miles per hour, respondents drove their vehicles at 50 to 60 miles per hour in an apparent attempt to elude the officers. J.A. 14, 15-17, 34-36; Pet. App. 15a-16a. After completing this fruitless detour the Pontiac and the pickup truck returned to the six-lane highway and continued to proceed in a southerly direction in the center lane. While the officers maintained their pursuit, Agent Cooke asked Officer Thrasher to signal both vehicles to stop. Thrasher pulled into the left lane alongside the Pontiac, the lead vehicle, and signaled the driver, re-

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[3] Cooke testified that, unlike campers used for camping purposes, in which matching curtains are usually hung, campers used to transport marijuana often have window coverings that are mismatched or hung sideways (J.A. 15).

spondent Sharpe, to pull over. As Sharpe moved his car into the right lane in compliance with this direction, the pickup truck, driven by respondent Savage, cut between the Pontiac and Thrasher's patrol car, nearly hitting the patrol car, and continued down the highway. J.A. 16-17, 36-37.

While Officer Thrasher pursued the pickup, DEA Agent Cooke pulled up behind the Pontiac (which had come to a stop), approached its occupants, and requested identification from respondent Sharpe and his companion. Sharpe produced a Georgia driver's license bearing the name Raymond J. Pavlovich. J.A. 17-18. Cooke then attempted for several minutes to radio Thrasher to determine whether he had succeeded in stopping the pickup, but he was unable to make contact, apparently because Thrasher was not in his patrol car. Approximately 10 to 15 minutes after the initial stop of the Pontiac, two local Myrtle Beach policemen arrived at the location of that stop to remain with Sharpe and his companion while Cooke left to locate Officer Thrasher and the pickup. J.A. 18-19, 28-29.

Meanwhile, Officer Thrasher had succeeded in stopping respondent Savage's pickup truck approximately a half-mile down the highway. As Thrasher got out of his patrol car with his revolver drawn, Savage stepped out of the truck. After searching Savage, Thrasher holstered his weapon and asked Savage to produce his driver's license and vehicle registration. Savage produced a Florida driver's license in his own name and a bill of sale in the name of Pavlovich. Noting that the truck bore South Carolina license plates, that the bill of sale bore a Georgia address and that Savage's license was from Florida, Thrasher questioned Savage about the ownership of the truck.

In response to the officer's questions, Savage stated that the vehicle belonged to a friend, that it was empty, and that he was taking it to get the shock absorbers fixed. He also denied speeding on the campground road and stated that Thrasher was not behind him when he drove through the area. When Thrasher told Savage that Cooke was a DEA agent and would be arriving shortly, Savage became nervous, requested that Thrasher return his driver's license, and asked permission to leave. Thrasher responded that Savage was not free to leave, that he would be detained until Cooke's arrival, and that he could be held on speeding charges if necessary. J.A. 37-39, 41-43.

When Agent Cooke arrived, approximately 20 minutes after the truck had been stopped, he identified himself, examined the bill of sale that Savage had produced, and observed that the name on it matched the name on the driver's license that Sharpe had produced. Cooke told Savage that he suspected that the pickup contained marijuana. He requested permission to search the truck, but Savage declined, explaining that he was not the owner of the vehicle. J.A. 20, 29-30. Cooke then stepped onto the rear bumper and, noting that the truck did not move in response, confirmed his suspicion that the truck was heavily loaded. Cooke then leaned against the rear window of the camper top, took a deep breath, and "smelled a very strong and distinct odor of marijuana." J.A. 20-21, 40. Using keys that he removed from the vehicle's ignition, Agent Cooke opened the rear door of the camper and found inside a large number of burlap-wrapped bags, which he described as "similar to the large number of bales of marijuana [he had] encountered over the * * * years"

that he had been employed as a DEA agent. J.A. 21, 40.

Cooke then placed Savage under arrest and left him in Officer Thrasher's custody while he returned to the Pontiac to arrest Sharpe and his companion (J.A. 21, 41).[4] In all, 30 to 40 minutes elapsed between the initial stop of the Pontiac and the arrests of Savage and Sharpe following the discovery of the marijuana bales in the pickup (J.A. 33; Pet. App. 17a).

Later that day, the pickup truck was taken to the Federal Building in Charleston, South Carolina. Two or three days later, DEA agents removed from the truck 43 bales weighing a total of 2,600 pounds. Acting without a search warrant, the agents selected eight bales at random, punctured their coverings, and withdrew core samples for laboratory analysis. J.A. 21-23. The analysis confirmed that the substance was marijuana.

On the basis of this evidence, the district court denied respondents' motions to suppress the marijuana, Sharpe's pseudonymous driver's license and the bill of sale for the pickup truck. J.A. 43-45.

2. A divided court of appeals reversed respondents' convictions (Pet. App. 14a-51a). The majority assumed that Agent Cooke "had an articulable and reasonable suspicion that [respondents] were engaged in marijuana trafficking when he and Thrasher stopped the Pontiac and the truck" (*id.* at 19a).

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[4] The charges against Sharpe's companion were ultimately dismissed (Pet. App. 16a). After Cooke left the location at which the pickup truck had been stopped, Savage attempted to bribe Thrasher, stating that if Thrasher would remove Savage's handcuffs and permit him to escape, "the owner of the truck would send [Thrasher] thirty thousand dollars" (J.A. 41).

But the court held the investigative stops of respondents unlawful because they "failed to meet the requirement of brevity" (*ibid.*) thought to govern such detentions on less than probable cause, which the court inferred from this Court's decisions in *Dunaway* v. *New York*, 442 U.S. 200 (1979), *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and *Terry* v. *Ohio*, 392 U.S. 1 (1968). The court of appeals relied particularly (Pet. App. 19a-20a) upon language in *Brignoni-Ponce* describing a *typical* border patrol investigatory stop (stated to be permissible if based on reasonable suspicion) as " 'usually consum[ing] no more than a minute' " (422 U.S. at 880, quoting Brief for the United States at 25). The majority considered only the duration of the respondents' detentions in holding that the encounters had exceeded the scope of investigation permissible on the basis of reasonable suspicion short of probable cause. Noting that "Sharpe was detained * * * for thirty to forty minutes before Cooke returned to the Pontiac to arrest him, and [that] Savage was held * * * by Thrasher for at least fifteen minutes before being questioned and finally arrested by Cooke," the majority concluded that "the length of the detentions effectively transformed them into de facto arrests without bases in probable cause" and that the detentions therefore constituted unlawful seizures under the Fourth Amendment (Pet. App. 20a).

The court of appeals concluded that the shipment of marijuana discovered in the pickup truck should have been suppressed as the fruit of the unlawful detention of respondents (Pet. App. 21a-22a).[5] The

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[5] The court of appeals deemed it unnecessary to decide whether Sharpe's driver's license and the bill of sale covering the truck should have been suppressed (Pet. App. 22a n.2).

court reasoned that, but for the extended detention of Savage, "Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck" (*id.* at 22a). The fact that the odor of marijuana was apparent to Agent Cooke as soon as he approached the truck was deemed irrelevant because "Cooke's smelling the marijuana was so intertwined with the circumstances of the unlawful detentions" (*ibid.*).

As an alternative basis for mandating suppression of the marijuana, the court of appeals held that the DEA agents' warrantless search of the burlap-wrapped marijuana bales discovered in the pickup truck violated the Fourth Amendment (Pet. App. 23a-25a). The court concluded that, under either the analysis adopted by the plurality opinion in *Robbins* v. *California*, 453 U.S. 420 (1981), or the expectation-of-privacy analysis employed in Justice Powell's concurring opinion in that case (*id.* at 429-430), the warrantless search of the bales was impermissible.

Judge Russell dissented (Pet. App. 26a-51a). He disagreed with the majority's holding that an investigative detention on less than probable cause is invariably unlawful if more than momentary. Instead, he expressed the view that, in determining whether the length of a detention renders a particular stop unreasonable, the courts must look to the totality of the circumstances justifying the detention (*id.* at 29a). Judge Russell observed that any delay that prolonged respondents' detention in this case was not attributable to the law enforcement officers, but was occasioned by respondent Savage's efforts to avoid being stopped together with respondent Sharpe. Because it was reasonable to detain both respondents for questioning by DEA Agent Cooke concerning

their suspected joint drug trafficking activities, Judge Russell concluded that the detention of respondents did not violate the Fourth Amendment (*id.* at 29a-38a).

Judge Russell also rejected the majority's alternative holding disapproving the warrantless search of the marijuana bales (Pet. App. 39a-51a). He reasoned that the distinctive odor emanating from the 2,600 pounds of marijuana effectively "place[d] the contents of the bales in 'plain view'" (*id.* at 44a-45a) and accordingly rendered their warrantless search permissible.

3. After rehearing en banc was denied by an equally divided court, the United States sought review in this Court. In our petition for a writ of certiorari (No. 81-1736), we presented three questions for review: (1) whether the investigative detention of respondents was unlawfully prolonged; (2) whether the marijuana found in the pickup truck was correctly found to be a fruit of any unlawful detention; and (3) whether the warrantless search of the bales was itself unlawful. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of the intervening decision in *United States* v. *Ross*, 456 U.S. 798 (1982). *United States* v. *Sharpe*, 457 U.S. 1127 (1982).[6]

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[6] Justice Stevens, joined by Justices Brennan and Marshall, dissented from this disposition, stating (457 U.S. at 1128) that in *Ross* the Court had held

> that the scope of a legitimate warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found. The issue presented in this case is whether

4. On remand, a divided court of appeals again reversed respondents' convictions (Pet. App. 1a-13a). The majority concluded that, in light of *Ross*, it was required to "disavow" (Pet. App. 2a) its alternative holding disapproving the warrantless search of the marijuana bales. But, "[f]inding that *Ross* does not adversely affect our primary holding that the initial stop of the vehicle and the lengthy detention of the two defendants constituted illegal seizures," the court readopted the prior opinion as modified, reaffirmed its previous decision, and reversed the convictions (*id.* at 2a-3a).

Judge Russell again dissented. In his view, this Court's remand required the court of appeals to reconsider its conclusion that the detention of respondents was unlawfully prolonged (Pet. App. 5a-7a).[7] Addressing that issue, he urged that the majority's adherence to its prior decision was inconsistent with *Michigan* v. *Summers*, 452 U.S. 692 (1981), and improperly failed to take into account the fact that respondents were themselves responsible for the circumstances that prolonged their detention (Pet. App. 8a-9a).[8]

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a warrantless search [of a vehicle] was itself legitimate. Since our opinion in *United States* v. *Ross* sheds no light on the proper disposition of the case, I respectfully dissent.

[7] The majority declined the urging of the dissent to reconsider its "principal holding or to reargue the same issues that were addressed in detail in the original majority and dissenting opinions," reasoning that its action complied with this Court's mandate (Pet. App. 2a n.1).

[8] Prior to entry of the court of appeals' judgments on remand, the opinions were circulated to the full court. A suggestion for en banc reconsideration was made by a member

INTRODUCTION AND SUMMARY OF ARGUMENT

I

The principal question presented by this case concerns the permissibility under the Fourth Amendment of detaining a suspect for a limited, but more than momentary, period on the basis of reasonable suspicion falling short of probable cause, for the purpose of pursuing a circumscribed investigation of the suspected criminal activity. This question is of great practical importance to law enforcement authorities. There are a wide variety of situations in which it may be advisable, in the course of a routine investigatory stop, for an officer to detain a suspect beyond the minute or two that, in the view of the court of appeals, define the outer boundaries of a permissible seizure on less than probable cause. For example, a suspect may be detained while the police attempt to determine whether a crime has occurred in the area or, if a crime is known to have occurred, to enable witnesses to the crime to view the suspect. See *Michigan* v. *Summers*, 452 U.S. 692, 700-701 n.12 (1981). Unless overturned, the holding of the court of appeals that investigatory stops that are more than momentary are per se unreasonable under the Fourth Amendment in the absence of probable cause, without regard to the facts or circumstances that affect the duration of the detention, would seriously impede legitimate law enforcement activities.

In support of its holding, the court of appeals relied on inferences drawn from the facts underlying

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of the court but failed to garner the necessary majority vote. Nevertheless, the opinions on remand reflect that the full court was divided five to four in favor of the decision of the panel majority (Pet. App. 3a, 4a, 13a).

this Court's decisions in *Terry* v. *Ohio*, 392 U.S. 1 (1968), *Adams* v. *Williams*, 407 U.S. 143 (1972), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). It is true that the stops involved in those cases were all quite brief. But, contrary to the decision below, it does not necessarily follow that any but the briefest detention must be treated as the equivalent of an arrest requiring probable cause.

Indeed, the court of appeals' approach is contrary to the fundamental standard of reasonableness embodied in the Fourth Amendment. As this Court's decision in *Summers* makes clear, "[i]f the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*" (452 U.S. at 700 n.12). See also *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 12 (noting that the Court has recognized "the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*").

The court of appeals therefore erred in refusing to consider the circumstances surrounding the officers' actions, which compel the conclusion that the detention of respondents was reasonable. To begin with, the stop of respondents was justified at its inception by a reasonable suspicion that they were engaged in drug trafficking. Moreover, the extended nature of respondents' detention "was reasonably related in scope to the circumstances which justified the interference in the first place" (*Terry* v. *Ohio*, 392 U.S. at 20). During the period that respondents were detained, DEA Agent Cooke diligently pursued his in-

vestigation into their suspicious activities. In assessing the reasonableness of the detention, it is highly significant that the delay encountered by Cooke in pursuing the investigation, which extended the period of detention, was not the fault of the law enforcement officers but was attributable to respondent Savage's evasive action that resulted in respondents' being stopped at separate locations by different officers. This case is therefore distinguishable from *Dunaway* v. *New York*, 442 U.S. 200 (1979), and *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), where the intrusive nature of the detentions more closely approximated aspects of a formal arrest and was due to the deliberate actions of the officers.

II

Even if the seizure of respondents was unreasonable under the Fourth Amendment, the marijuana seized from the pickup truck is not a suppressible fruit of any illegality to which respondent Sharpe was subjected. Assuming that Sharpe had a legitimate privacy interest in the contents of the truck, that interest was not infringed by Agent Cooke's detection of the odor of marijuana emanating from the rear of the pickup. See *United States* v. *Place*, slip op. 10-11. At most, the discovery of the marijuana was the fruit of the seizure of Savage and his truck; it was not the result of any impropriety connected with Sharpe's detention. In short, the discovery of the marijuana following Savage's detention "invaded no right of privacy of person or premises which would entitle [Sharpe] to object to its use at his trial." *Wong Sun* v. *United States*, 371 U.S. 471, 492 (1963).

ARGUMENT

I. THE DETENTION OF RESPONDENTS WAS REASONABLE UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects the "right of the people to be secure in their persons * * * against unreasonable searches and seizures." There is no question that respondents were "seized" within the meaning of the Fourth Amendment when Agent Cooke and Officer Thrasher stopped respondents' vehicles and detained respondents for the purpose of inquiring into their suspicious conduct. See *Berkemer* v. *McCarty*, No. 83-710 (July 2, 1984), slip op. 15; *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979). The court of appeals assumed (Pet. App. 19a), quite properly in our view, that the initial stop of respondents was justified by a reasonable suspicion that they were engaged in marijuana trafficking. It is also clear that respondents were not formally arrested until after Agent Cooke discovered the marijuana inside the pickup truck driven by Savage. We concede, for purposes of this case, that probable cause to arrest respondents for drug offenses did not arise prior to Cooke's discovery of the marijuana. Thus, the question posed is whether the police may, on the basis of reasonable suspicion not amounting to probable cause, detain a person for a limited but more than momentary period where necessary to advance their investigation.

Although it assumed that the initial seizure of respondents was lawful, the court of appeals held that the permissible seizure became unlawful by virtue of its extended duration. In reaching this result, the court focused solely on the length of time respondents were detained, without regard to the circumstances that necessitated the extended nature of the detention. By adopting a per se rule of "brevity"

while eschewing an examination of the reasonableness of the officers' actions in light of all the circumstances, the court of appeals seriously departed from the central teaching of the Fourth Amendment.

A. In Determining Whether A Seizure Less Intrusive Than A Traditional Arrest Is Permissible Under The Fourth Amendment, It Is Necessary To Consider The Reasonableness Of The Seizure In Light Of All The Surrounding Circumstances

1. In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court first "recognized the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause." *Michigan* v. *Summers*, 452 U.S. 692, 698 (1981). See *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 5-6; *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 6 (plurality opinion). In upholding a frisk of an individual reasonably believed to be armed and dangerous, the Court implicitly acknowledged that the Fourth Amendment permits forcible stops when the officer has a reasonable suspicion that a crime has been or is being committed. See *Terry* v. *Ohio*, 392 U.S. at 32-33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring). The Court explicitly adopted that rule and explained its rationale in *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972):

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or

> to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Thereafter, in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-882 (1975), the Court applied these principles in holding that a reasonable suspicion of criminal activity warrants a brief stop of an automobile for the purpose of investigating the circumstances arousing suspicion. "These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." *Michigan* v. *Summers*, 452 U.S. at 699.

At the same time, however, the Court has emphasized that *Terry* and its progeny created only limited exceptions to the general rule that an official seizure of the person must be supported by probable cause. See *Michigan* v. *Summers*, 452 U.S. at 696; *Florida* v. *Royer*, slip op. 7 (plurality opinion). The classic example of a seizure requiring probable cause is a traditional arrest but, as the Court made clear in *Dunaway* v. *New York*, 442 U.S. 200 (1979), the formal label attached by the police is not the dispositive factor. Rather, probable cause is required whenever a suspect's freedom of movement is restrained by means that resemble the conditions of a traditional arrest.[9]

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[9] In *Dunaway*, the detention lasted approximately one hour, involved transportation of the suspect to the police station without his consent, and was undertaken for the purpose of

The brief stops involved in *Terry*, *Adams*, and *Brignoni-Ponce*, and the more severe detention involved in *Dunaway* stand arrayed along a spectrum defining the range of Fourth Amendment seizures. Between these two points of demarcation are detentions that are more than momentary and yet not so intrusive as to have the essential attributes of a formal arrest. The lawfulness of such detentions

> rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general proscription against unreasonable searches and seizures." * * * We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.

United States v. *Place*, slip op. 6-7 (quoting from *Terry* v. *Ohio*, 392 U.S. at 20). See also, *e.g.*, *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979).

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custodial interrogation of apparently unlimited duration, culminating in a formal arrest when Dunaway confessed.

The rule requiring probable cause for arrests and their equivalents is the result of applying the Fourth Amendment's reasonableness standard. As the Court stated in *Dunaway* (442 U.S. at 208): "The standard of probable cause * * * represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." See *Michigan* v. *Summers*, 452 U.S. at 699-700.

The court of appeals apparently believed that this general reasonableness analysis may be applied only to the limited class of cases involving a momentary detention of a suspect, as in *Terry*, *Adams*, and *Brignoni-Ponce* (see Pet. App. 19a-20a). Under this view, any seizure that lasts more than a minute or two must be justified by probable cause and, in the absence thereof, is unlawful regardless of its apparent reasonableness (or, put another way, is presumptively unreasonable). As this Court's recent decisions demonstrate, however, the court of appeals' approach is inconsistent with "the ultimate standard of reasonableness embodied in the Fourth Amendment." *Michigan* v. *Summers*, 452 U.S. at 699-700 (footnote omitted).

2. In *Michigan* v. *Summers*, *supra*, this Court held that it was lawful for the police to detain the occupants of a house on less than probable cause while executing a warrant authorizing a search of the premises for contraband. In reaching this result, the Court emphasized (452 U.S. at 700; footnote omitted) that

> the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*.

The Court noted in this regard that *Terry* is not "'an almost unique exception to a hard-and-fast standard of probable cause.' Rather, 'the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests.'" *Summers*, 452 U.S. at 700 n.12 (quoting from *Dunaway*, 442 U.S. at 219 (White, J., concurring)). The Court in *Summers* then explained (452 U.S. at 700 n.12) that

> [i]f the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*.

The Court also quoted with approval Professor LaFave's comments on the permissible scope of investigative detention based on reasonable suspicion:

> "It is clear that there are several investigative techniques which may be utilized effectively in the course of a *Terry*-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale."

Summers, 452 U.S. at 700-701 n.12 (quoting 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978)).

Professor LaFave's summary of the governing principles concludes that the permissibility of extending a *Terry* stop should turn on "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and whether it is rather essential to the investigation that the suspect's presence be continued during that interval." *Id.* at 40 (quoted in *Summers*, 452 U.S. at 701-702 n.14).

Thus, while *Summers* itself involved the detention of a suspect in the course of conducting a warrant-authorized search of his premises, the Court's analysis clearly demonstrates that a law enforcement officer making a valid *Terry* stop may also lawfully detain the suspect for more than a brief moment if such action is reasonably required in order to pursue a legitimate avenue of investigation.[10]

The Court recently reaffirmed these principles in *United States* v. *Place*, *supra*. Although the Court there held that "on the facts presented" (slip op. 13) the 90-minute investigative detention was unduly prolonged, it once again acknowledged "the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*" (slip op. 12). To be sure, the Court recognized (as do we) that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion"

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[10] Indeed, the Court noted in *Summers* that the mere fact that its holding arose in the context of "a case in which the police had a warrant [did] not * * * preclude the possibility that comparable police conduct may be justified by exigent circumstances in the absence of a warrant" (452 U.S. at 702 n.17).

(slip op. 12-13). But the Court pointedly "decline[d] to adopt any outside time limitation for a permissible *Terry* stop" (slip op. 13; footnote omitted), explaining that adoption of a "rigid time limitation," such as the 20 minute period allowed by the American Law Institute's Model Code of Pre-Arraignment Procedure, would be unwise because it "would undermine the * * * important need to allow authorities to graduate their responses to the demands of any particular situation" (slip op. 13 n.10). Moreover, the Court emphasized that the reasonableness of a given period of detention cannot be assessed without regard to the diligence—or lack thereof—of police in pursuing their investigation by reasonably available means (slip op. 13).

The courts of appeals have also upheld the detention of a suspect beyond a momentary stop in a number of different settings, where the justification for extending the detention outweighed the intrusion on the suspect's privacy. For example, in *United States* v. *Short*, 570 F.2d 1051, 1054-1055 (D.C. Cir. 1978), the court held that it was permissible for the police to detain a burglary suspect, whom they lacked probable cause to arrest, for the purpose of transporting the suspect to the scene of the burglary for possible identification by the victim. Accord, *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). And in *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976), the court concluded that the Fourth Amendment permitted the police to detain a person suspected of smuggling firearms for the period necessary to obtain the presence of a law enforcement officer with specific expertise in conducting investigations of such offenses. Accord, *United*

States v. *Moore*, 638 F.2d 1171, 1174 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981) (approving investigative detentions necessary to obtain presence of police officers with special expertise; collecting cases).[11]

The decision below is plainly at odds with the decisions of this Court concerning the permissible duration of detentions that may be justified on less than probable cause. In light of the Court's unequivocal statements in *Summers* and *Place* that *Terry*, *Adams*, and *Brignoni-Ponce* do not mark the outer perimeter of permissible investigation, the court of appeals' reliance upon those very cases to establish a rigid limit of a few minutes upon the duration of such detentions was clearly unwarranted. Moreover, the deci-

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[11] See also *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (approving detention of two persons suspected of drug smuggling for more than an hour while DEA agents checked with the Federal Aviation Administration to determine whether the aircraft in which the suspects were about to depart was stolen); *United States* v. *Mayes*, 524 F.2d 803, 805-808 (9th Cir. 1975) (upholding detention of suspected drug smuggler for an hour and a half while Border Patrol agents attempted to verify or disprove suspect's exculpatory explanation concerning his activities); *United States* v. *Contreras-Diaz*, 575 F.2d 740, 745 (9th Cir.), cert. denied, 439 U.S. 855 (1978) (inability of suspected illegal aliens to furnish valid identification justified their prolonged detention to permit a check with the Border Patrol); *United States* v. *Streifel*, 665 F.2d 414 (2d Cir. 1981) (upholding stop and boarding of vessel where 48 minutes elapsed between initial order to stop and acquisition of probable cause to arrest); *United States* v. *Ogden*, 703 F.2d 629, 633-634 (1st Cir. 1983) (stop of four tractor-trailers and detention of ten individuals for a half hour held justified where officers reasonably suspected that the trucks were being used in a drug smuggling scheme).

sion of the court of appeals ignores the everyday realities of police-citizen encounters. As the Court in *Summers* recognized (see page 20, *supra*), there are numerous situations in which an officer's suspicions may not be resolved but may be further aroused as a result of questioning a suspect during a *Terry* stop. If any further detention of the suspect for investigation were prohibited in the absence of probable cause, no matter how limited the intrusion on personal freedom and regardless of the reasonableness of the detention, legitimate law enforcement efforts would be seriously hampered.

3. The court of appeals thus erred in refusing to consider the law enforcement purposes to be served by the detention, the time needed reasonably to effectuate those purposes, or the circumstances of this case that prolonged respondents' detention. Consideration of these factors is the very essence of the Fourth Amendment's reasonableness requirement. Since *Terry*, the Court has invariably assessed the reasonableness of Fourth Amendment seizures by inquiring "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place" (392 U.S. at 19-20). This inquiry necessarily entails a weighing of all of the pertinent facts and circumstances in each case. As the plurality in *Royer* explained (slip op. 8-9):

> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an

investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.

In sum, proper Fourth Amendment analysis requires the courts to measure the lawfulness of an extended *Terry* stop by the substantiality and rationality of the officers' justification for undertaking it. The inquiry should focus on the purpose of extending the detention—*i.e.*, the specific course of action that the police pursued during the period, and whether these actions were likely to produce confirmation of their suspicions within a relatively short period. The court should also consider such factors as the gravity of the offense under investigation, the risk that the suspect would avoid apprehension if released, the substantiality of the officers' suspicions, the degree of inconvenience caused to the suspect by the detention, the intrusion of circumstances beyond the officers' control that cause prolongation of the detention, and, of course, considerations relating to the officers' personal safety. The court of appeals failed to undertake this necessary inquiry.

B. Examination Of The Surrounding Circumstances Compels The Conclusion That Respondents Were Reasonably Detained

If the court of appeals had considered the competing factors, as required by the Fourth Amendment, it undoubtedly would have reached the conclusion that the detention of respondents was reasonable.

First, it is clear that the substantial law enforcement interest in investigating suspected drug trafficking justified the initial stop of respondents. See *United States* v. *Place*, slip op. 7-8; *United States* v. *Mendenhall*, 446 U.S. 544, 561-562 (1980) (opinion

of Powell, J.). The court of appeals did not dispute that at the time he asked Officer Thrasher to signal respondents' vehicles to stop, Agent Cooke had a reasonable suspicion that respondents were engaged in illegal activity. Cooke, an experienced narcotics agent, observed the vehicles during the early morning hours as they travelled in tandem for 21 miles in an area near the coast frequented by drug traffickers. The agent knew that pickup trucks with camper shells are often used to transport marijuana smuggled into the United States. In addition, the pickup truck appeared to be heavily loaded and the windows of the camper were covered with what appeared to be a makeshift covering in a fashion commonly used to conceal shipments of contraband. Finally, respondents' vehicles took evasive actions and began speeding after Thrasher, in his marked police car, joined Agent Cooke in following respondents. Based on these facts, Cooke acted properly in attempting to stop respondents' vehicles for the limited purpose of questioning respondents about their activities and attempting to ascertain whether the pickup was loaded with drugs.[12]

Second, it is similarly clear that the intrusion here "was reasonably related in scope to the circumstances which justified the interference in the first place" (*Terry*, 392 U.S. at 20). In particular, the 30 to 40 minute period of detention between the initial stopping of respondent Sharpe and his arrest, and, *a*

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[12] We note in addition that Officer Thrasher apparently had probable cause to arrest both respondents for speeding. Thus, there can be no question as to the propriety of the initial stop of either respondent, even if the officers were motivated in making it by their desire to investigate possible drug offenses. *Scott* v. *United States*, 436 U.S. 128, 136-137 (1978).

fortiori, the roughly 25 minutes elapsed in respondent Savage's case, was entirely reasonable under the circumstances. Agent Cooke diligently pursued his investigation, seeking assistance when necessary from other law enforcement agencies, both state and local. See pages 4-5, *supra*. Compare *Place*, slip op. 13 & n.9; *Royer*, slip op. 13-15 (plurality opinion).[13] This diligent pursuit of the investigation strongly supports a determination of reasonableness. *Place*, slip op. 13; *Summers*, 452 U.S. at 701-702 n.14.

Moreover, as Judge Russell observed in his dissent below (Pet. App. 29a-31a, 38a), the delay found excessive by the majority was no fault of the officers but was almost entirely attributable to the evasive action taken by respondent Savage, which resulted in respondents' being stopped a half-mile apart by different law enforcement officers. The fact that respondents were stopped at separate locations made

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[13] This case contrasts sharply with *Place*, in which the Court found that the agents did not exercise proper diligence in pursuing their investigation. In *Place*, the agents knew hours in advance that the defendant—a suspected drug courier—would be arriving in New York on a specific flight; they therefore "had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on [the defendant's] Fourth Amendment interests" (slip op. 13; footnote omitted). Instead, because the agents waited until after Place's arrival before making the necessary arrangements for exposure of his luggage to a narcotics detection dog at a different location, the detention was unnecessarily prolonged. Similarly, in *Royer*, the plurality observed that the agents could have sought to secure Royer's consent to search his luggage on the spot, without moving him to an interrogation room (slip op. 13-14). In addition, the plurality pointed out that Royer's detention could have been minimized by exposing his luggage to a narcotics detection dog (slip op. 14-15).

it impossible for Cooke, the only DEA agent on the scene, to inspect the pickup truck, which was the focus of his suspicion, and to question its driver, respondent Savage, until police reinforcements arrived to maintain the status quo with respect to respondent Sharpe. Cooke's unsuccessful efforts to contact Officer Thrasher by radio, his wait for reinforcements, and his trip from Sharpe's Pontiac to the pickup, all necessitated by the separation, consumed most of the period—perhaps 20-25 minutes (J.A. 29). Once Cooke finally reached the pickup, less than 10 minutes elapsed before he discovered the marijuana, placed Savage under arrest, and returned to arrest Sharpe (J.A. 30, 31, 33).[14]

The court of appeals did not question the reasonableness of Agent Cook's actions upon his arrival at the pickup truck. Indeed, the evidence demonstrates that Cooke wasted no time in pursuing his investigation: Cooke examined the bill of sale that Savage had turned over to Officer Thrasher, informed Savage of his suspicion that the truck contained marijuana, and requested permission to search the truck. When Savage refused to consent, Cooke stepped on the rear bumper of the truck to confirm his suspicion that it was heavily loaded. The agent then detected the odor of marijuana emanating from the truck; he thereupon removed the keys from the ignition, opened the rear doors, and discovered a large quantity of marijuana packed in bales. Given the reasonableness of Cooke's actions at the pickup, there can be no serious question that if both respondents had

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[14] Any time elapsed while Agent Cooke returned to the location where Sharpe was waiting is irrelevant for the additional reason that probable cause to arrest him had, by that point, arisen.

pulled over at one location in compliance with Thrasher's signal, their subsequent detention would have been permissible under the Fourth Amendment.

The reasonableness of Agent Cook's actions prior to his arrival at the pickup is reinforced by consideration of the alternatives open to him once he and Officer Thrasher succeeded in stopping respondents a half-mile apart. Cooke could simply have ignored his by then substantially heightened suspicions and permitted Sharpe to go—a course of action that many reasonable people would surely view as quite irresponsible in the circumstances.[15] Or, assuming that his vehicle was equipped to transport respondent Sharpe (and his passenger) securely, and that it was prudent to leave Sharpe's Pontiac unguarded, Agent Cooke might have taken Sharpe to the location where Officer Thrasher had stopped Savage. But even if this were otherwise feasible, it would have required handcuffing Sharpe, placing him in a locked police car, and transporting him some distance—thereby elevating the intrusive character of the detention. And, although we would argue otherwise, the very

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[15] Agent Cooke had every reason to believe that Sharpe, having been alerted to the investigation into the marijuana trafficking scheme, would seek to avoid apprehension if released. Although Sharpe produced a Georgia driver's license in the name of Pavlovich, the agent was not obligated to accept this document as definitive proof of Sharpe's identity; the agent undoubtedly was aware that drug traffickers often employ false identification documents. See, *e.g.*, *Royer*, slip op. 2 (plurality opinion); *United States* v. *Mendenhall*, 446 U.S. at 548; *United States* v. *Stevie*, 578 F.2d 204, 208 (8th Cir. 1977), rev'd on other grounds, 582 F.2d 1175 (1978) (en banc), cert. denied, 443 U.S. 911 (1979); *United States* v. *Scott*, 545 F.2d 38, 39 (8th Cir. 1976), cert. denied, 429 U.S. 1066 (1977).

act of transporting Sharpe might itself support a claim that the investigative detention had become a custodial arrest. See *Royer*, slip op. 13 (plurality opinion). Plainly, the consequences of these alternatives suggest that the course adopted by Agent Cooke in pursuing his investigation was at least reasonable, if not the only one open to him under the Fourth Amendment.

In reaching a contrary result, the court of appeals mistakenly relied on *Dunaway* v. *New York*, *supra*.[16] *Dunaway* did not hold that a detention that is extended by circumstances beyond the control of the officers is unreasonable under the Fourth Amendment. In *Dunaway* police, acting on information (not amounting to probable cause) that implicated Dunaway in a murder, went looking for him and, after locating him at a neighbor's house, placed him in a police car and brought him to a police station without his consent. There, after being given *Miranda* warnings, Dunaway was interrogated in a custodial setting for a period of an hour, at which point he confessed to the crime. Although Dunaway had not been formally arrested and charged with a crime, the Court held that his detention without probable cause was unlawful because it was "in important respects indistinguishable from a traditional arrest" (442 U.S. at 212). In support of this characterization the Court noted the extended interrogation to which Dunaway was subjected, the involuntay trans-

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[16] As we have already shown (see pages 19-24, *supra*), the court of appeals also erred in relying on *Terry* and *Brignoni-Ponce* for the proposition that a more than momentary detention is unreasonable per se unless supported by probable cause.

fer to the police station, and the use of an interrogation room, as well as the fact that he was not told he was free to go and in fact would not have been allowed to depart had he attempted to do so. Here, by contrast, the detention was considerably briefer than in *Dunaway*, and its length was not attributable to the deliberate actions of the officers. Moreover, respondents were not transported to a police station, placed in an interrogation room, and subjected to extended questioning, but were questioned briefly where they were stopped. Unlike in *Dunaway*, therefore, the intrusion on respondents' Fourth Amendment interests was strictly tied to the circumstances that justified their detention in the first instance.

The holding of *Florida* v. *Royer*, *supra*, that the investigative detention there had gone beyond permissible bounds, is similarly distinguishable. The Court's decision there rests upon the use of *unnecessarily* intrusive means of investigation and conditions of restraint (see slip op. 11-12 & n.9, 13-15 (plurality opinion)) that have no analogue here. Moreover, the detention in that case lasted approximately 15 minutes—far more than the few minutes the court of appeals thought permissible here—and yet the plurality opinion did not suggest any illegality in the duration of the stop. Rather, the plurality emphasized that the "scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case," adding that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop" (slip op. 8-9). As we have explained

above, the actions of the officers in this case meet these criteria.[17]

In short, contrary to the holding of the court of appeals, the officers' actions in stopping respondents and detaining them for a limited period to pursue a legitimate investigation into suspected criminal conduct is simply an example of proper police work. The officers' "graduate[d] * * * responses to the demands of [the] particular situation" (*Place*, slip op. 13 n.10) plainly meet the Fourth Amendment's standard of reasonableness.

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[17] The court of appeals' decisions cited by the majority below (Pet. App. 21a), all of which antedate *Summers* and *Place*, also do not support the result reached here. In *United States* v. *Chamberlin*, 644 F.2d 1262 (9th Cir. 1980), cert. denied, 453 U.S. 914 (1981), the court held that the defendant's 20-minute detention was unreasonable in the absence of probable cause, specifically noting that the defendant "was not questioned briefly where he was found. He was placed in the back seat of a police car for twenty minutes." *Id.* at 1267. In *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979), the defendant was removed from his car and taken to a Border Patrol office, where he was detained for three hours in an interrogation room pending the arrival of DEA agents. Finally, in *United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976), the court held that a gun discovered during a frisk of the defendant should have been suppressed because the defendant was "seized and wrongfully detained for an *unnecessarily* long period against his will" (*id.* at 253 (emphasis added)), and also because the officer did not have a sufficiently particularized suspicion that the defendant was carrying a weapon or otherwise posed a threat to the officer (*id.* at 254). While we do not necessarily agree with the results in these cases, none of them analyzes the propriety of the detention solely in terms of duration, as the court of appeals mistakenly did here.

II. THE MARIJUANA SEIZED FROM THE PICKUP TRUCK IS NOT A SUPPRESSIBLE FRUIT OF ANY ILLEGALITY TO WHICH RESPONDENT SHARPE MAY OBJECT

The question whether the sanction of exclusion should be imposed in a particular case is " 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.' " *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 7 (quoting *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 8). It is our submission that even if the court of appeals were correct in concluding that the duration of the detentions rendered the seizure of respondents unreasonable under the Fourth Amendment, it erred in holding that respondent Sharpe could obtain suppression of the marijuana discovered in the pickup truck driven by respondent Savage.[18]

As this Court has recently observed, "the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure * * *, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' " *Segura* v. *United States*, No. 82-

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[18] In our petition for certiorari, we also argued (at 21-23) that respondent Savage could not invoke the exclusionary rule to suppress the marijuana by virtue of any illegality associated with the extended nature of his detention. We noted that the information establishing probable cause to believe that the pickup contained marijuana—*viz.*, the strong odor of marijuana emanating from the truck—was immediately discoverable, and thus, although discovery of that information was delayed, the information itself should be deemed a fruit of the lawful stop of Savage and not of any unlawful prolongation of the detention. After further consideration, we have decided not to press this argument in this brief.

5298 (July 5, 1984), slip op. 7-8 (citations omitted). At the same time, however, the Court has reiterated that evidence is to be suppressed only if it "is in some sense the product of illegal governmental activity." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). See *Nix* v. *Williams*, No. 82-1651 (June 11, 1984), slip op. 11.

In this case, the discovery of the marijuana in the pickup did not result from any illegality to which respondent Sharpe may object. That conclusion is inescapable from an examination of this Court's decision in *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

In *Wong Sun* the Court held that defendant Toy's Fourth Amendment rights were violated when law enforcement agents entered Toy's home without consent or a warrant and arrested Toy without probable cause (371 U.S. at 479-484), and that Toy's incriminating statements to the officers immediately following his unlawful arrest were suppressible fruits of the agents' illegal conduct (*id.* at 484-487). The Court also held that because the statements unlawfully obtained from Toy led the officers to seize heroin from the premises of a third party, Yee, the heroin, which was come at by exploitation of the prior illegality, was also suppressible as to Toy as the fruit of the poisonous tree (*id.* at 487-488). The Court then turned to examine the admissibility of the heroin against Toy's co-defendant Wong Sun (*id.* at 491-492). It observed (*id.* at 492) that its holding that the heroin

> was inadmissible against Toy does not compel a like result with respect to Wong Sun. The exclusion of the narcotics as to Toy was required solely by their tainted relationship to informa-

> tion unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial.

Here, the discovery of the marijuana did not result from the invasion of any legitimate privacy interest respondents may have had in the pickup truck. Agent Cooke's detection of the odor of marijuana emanating from the truck clearly was not a search of the truck within the meaning of the Fourth Amendment. See *Place*, slip op. 10-11. At most, the discovery of the marijuana was a product of the seizure of Savage and his truck; it plainly was not the result (under *any* standard of causation) of any official impropriety connected with the detention of Sharpe. Accordingly, the marijuana may in no event be suppressed (as to either respondent) on the basis of the somewhat greater duration of the detention of Sharpe (see also page 28 note 14, *supra*).[19] Moreover, the discovery of the marijuana following *Savage's* detention "invaded no right of privacy of person or premises which would entitle [Sharpe] to object to its use at his trial." *Wong Sun*, 371 U.S. at 492. Thus, if the Court concludes, based on the duration of Savage's detention, that Savage was un-

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[19] Indeed, the court of appeals' fruits analysis appears to focus exclusively upon the question whether the detention of Savage tainted the discovery of the marijuana (Pet. App. 22a). The court of appeals' conclusion that Sharpe's detention was unlawful may accordingly be surplusage. But it is not clear that the court of appeals' determination that the detention of Savage was unlawful was based entirely on the duration of *his* detention (see Pet. App. 20a-21a).

lawfully seized, only Savage would be entitled to suppression of the marijuana.[20]

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1984

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[20] We note that it is not open to respondent Sharpe to contend that the government's ability to connect him to the marijuana at trial was the fruit of his unlawful detention. It is settled that a criminal defendant "cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest." *United States* v. *Crews*, 445 U.S. at 474. As the Court in *Crews* explained (*ibid.*):

> The exclusionary principle of *Wong Sun* and *Silverthorne Lumber Co.* delimits what proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421623 10027

(5)

Office - Supreme Court, U.S.
FILED
AUG 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-529

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED ON SEPTEMBER 27, 1983
CERTIORARI GRANTED ON JUNE 18, 1984

BEST AVAILABLE COPY

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

United States* v. *William Harris Sharpe

Cr. No. 78-138

Date	Filings—Proceedings
7/11/78	Indictment filed
7/21/78	Arraignment; defendant pleads not guilty
8/7/78	Motion of defendant to suppress evidence and memorandum in support filed
7/31/79	Non-jury trial and hearing on motions to suppress
8/1/79	Continuation of motion to suppress—motions denied, and non-jury trial
8/1/79	Oral order finding defendant guilty as charged
10/24/79	Sentence hearing Judgment and commitment order: Defendant committed to custody of Attorney General for period of five years to be followed by special parole term of 10 years.

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

United States* v. *Donald Davis Savage

Cr. No. 78-138

Date	Filings—Proceedings
7/11/78	Indictment filed
7/21/78	Arraignment; defendant pleads not guilty
8/7/78	Motion of defendant to suppress evidence and memorandum in support filed
7/31/79	Information pursuant to 21 U.S.C. 851 filed
7/31/79	Non-jury trial and hearing on motions to suppress
8/1/79	Continuation of motion to suppress—motions denied, and non-jury trial
10/24/79	Sentence hearing Judgment and commitment order: Defendant committed to custody of Attorney General for period of 8 years to be followed by special parole of 10 years.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

CRIMINAL NO. 78-138
21 USC 841(a)(1) & 18 USC 2

UNITED STATES OF AMERICA

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

INDICTMENT

THE GRAND JURY CHARGES:

That on or about the 9th day of June, 1978, in the District of South Carolina, WILLIAM HARRIS SHARPE and DONALD DAVIS SAVAGE unlawfully, knowingly and willfully did possess with intent to distribute approximately 2,600 pounds of marihuana, a Schedule I Controlled Substance as set forth in Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

A True Bill

/s/ M. T. Abbott
M. T. ABBOTT
Foreman

/s/ Thomas E. Lydon, Jr.
United States Attorney

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Criminal No. 78-138

UNITED STATES OF AMERICA

v.

DONALD DAVIS SAVAGE

INFORMATION PURSUANT TO 21 USC § 851

I, Thomas E. Lydon, Jr., United States Attorney for the District of South Carolina, do accuse the defendant above named, who was charged on the 11th day of July, 1978, in the District of South Carolina with possession with intent to distribute marihuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2, of having been convicted previously as herein below described:

The said defendant, on or about the 26th day of June, 1974, in the Northern District of Florida, Gainesville Division, was duly convicted of one count of conspiracy to possess with intent to distribute marihuna, in violation of Title 21, United States Code, Section 846.

/S/ Thomas E. Lydon, Jr.
THOMAS E. LYDON, JR.
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

CRIMINAL NO. 78-138

UNITED STATES OF AMERICA

v.

WILLIAM HARRIS SHARPE, ET AL.

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant in the above-styled case, WILLIAM HARRIS SHARPE, through counsel, and moves this Honorable Court to suppress the evidence in this matter and alleges as follows:

—1—

On or about June 9, 1978, State and Federal agents conducted a search of a vehicle which Defendant SHARPE was operating on a public highway in Horry County, South Carolina.

—2—

After the search of the vehicle, the agents seized certain items which are alleged to constitute evidence in the present matter and which are to be utilized in the trial of the parties hereto.

—3—

Defendant SHARPE is an aggrieved party as contemplated by Rule 41, F.R.Crim.P., and thus has standing to object to the search and seizure.

—4—

The search and the resulting seizure are unlawful, unreasonable and in violation of Defendant's rights under the Fourth Amendment to the Constitution of the United States, in that the search and seizure were conducted with-

out a search warrant and without probable cause and in furtherance of an unlawful arrest made without probable cause and in violation of law.

WHEREFORE, Defendant, WILLIAM HARRIS SHARPE, respectfully prays that this Honorable Court conduct an evidentiary hearing and order suppressed all evidence or testimony derived from such an unlawful search and seizure.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

CRIMINAL NO. 78-138

UNITED STATES OF AMERICA

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant in the above-styled action, DONALD DAVIS SAVAGE, through counsel, and moves this Honorable Court to suppress the evidence in this matter and alleges as follows:

—1—

On or about June 9, 1978, State and Federal agents conducted a search of a vehicle which Defendant SAVAGE was operating on a public highway in Horry County, South Carolina.

—2—

After the search of the vehicle, the agents seized certain items which are alleged to constitute evidence in the present matter and which are to be utilized in the trial of the parties hereto.

—3—

Defendant SAVAGE is an aggrieved party as contemplated by Rule 41, F.R.Crim.P., and thus has standing to object to the search and seizure.

—4—

The search and the resulting seizure are unlawful, unreasonable and in violation of Defendant's rights under the Fourth Amendment to the Constitution of the United States, in that the search and seizure were conducted with-

out a search warrant and without probable cause and in furtherance of an unlawful arrest made without probable cause and in violation of law.

WHEREFORE, Defendant, DONALD DAVIS SAVAGE, respectfully prays that this Honorable Court conduct an evidentiary hearing and order suppressed all evidence or testimony derived from such an unlawful search and seizure.

Respectfully submitted,

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RELEVANT PORTIONS OF JOINT SUPPRESSION HEARING—TRIAL TRANSCRIPT

Testimony of Luther D. Cooke—July 31, 1979

* * * * *

[16] Q. All right, sir. Mr. Cooke, since you've been with the Drug Enforcement Administration and the predecessor agencies, what portion of your time has been devoted to enforcement of the controlled substances laws of this country?

A. It's been on a full-time basis since 1966; and in the last six years I've spent approximately thirty percent of my time in a supervisory manner and another thirty to fifty percent of the time actually on the street working cases.

Q. All right, sir. Would you tell us as best you can, would you reconstruct the number of drug cases you've made in your career?

A. In my career probably in excess of seven hundred and in the last three years I've worked on major marijuana smuggling cases in [17] excess of one a month for the last three years.

Q. All right, sir. Have these involved primarily boat cases or have they been boat cases and aircraft cases?

A. Starting in 1970 we worked primarily airplane cases for a year or two. Since being in the Charleston area and during a portion of the time I was in Miami, the majority of the cases have been boat cases.

Q. All right, sir. What has been your experience with the transportation once unloaded of marijuana?

MR. TURNER: I object on the grounds that it has no relevancy—

THE COURT: What is your question?

MR. SIMPSON: Your Honor, I asked him what his experience has been relative to the transportation of marijuana once it had been unloaded.

THE COURT: I overrule the objection.

A. My primary work—

MR. SIMPSON: Wait [18] a minute. I'm sorry. You overruled the objection. He objected and you overruled it.

THE COURT: I overruled it.

Q. I'm sorry. Go ahead, Mr. Cooke.

A. My primary work for the last five years has been with some of the ground based units operating in a surveillance capacity on the off load crews and the transportation crews for the large marijuana loads. Primarily these have involved large trucks, four wheeled drive pickup trucks with campers on them and in a few instances automobiles.

Q. All right, sir. Mr. Cooke, I ask you if you were engaged in your official capacity on the evening of June 8th and early morning hours of June the 9th, 1978?

A. Yes, sir, I was.

Q. All right, sir. And did you have occasion to go anywhere?

A. Yes, sir. I traveled from Charleston, South Carolina to Horry County, South Carolina, during the late hours of June the 8th, 1978 and [19] after that on into the Brunswick County area of North Carolina.

Q. Prior to going to Brunswick County area of North Carolina, did you meet with anyone?

A. Yes, sir. I met with a number of law enforcement officers from U.S. Customs Patrol, the State Law Enforcement Division, Horry County Police Department, State Bureau of Investigation agents from North Carolina and a couple of law enforcement agents from North Carolina as well as one of my own D.E.A. agents at Nixon's Crossroad in Horry County.

Q. All right, sir. And without going into any conversation you had with any of those officers, what was the nature of that meeting, Mr. Cooke?

A. The meeting was primarily a briefing with regards to some activity that was occurring in the Horry County, South Carolina and Brunswick County, North Carolina areas.

[35] * * * * *

Q. Mr. Cooke, what was the purpose of your being in the Nixon's Crossroads area and any trip you made from there into North Carolina?

THE COURT: There is nothing wrong with that question.

MR. TURNER: The defense will stipulate he was in there in connection with suspected marijuana activity.

[39] * * * * *

Q. All right, sir. What occurred next?

A. About 6:30 I met a blue Ford pickup truck with a white Shell camper on it which was being driven by Mr. Savage, Donald Davis Savage.

THE COURT: Wait a minute. You met the Ford pickup with a blue camper?

THE WITNESS: No, sir. A blue Ford with a white camper.

THE COURT: And you recognized Mr. Savage?

THE WITNESS: No, sir, [40] I did not, not at that time.

THE COURT: All right, sir.

A. I met the Ford pickup with a white camper on it as I was a little over a mile from the intersection of State Road 1186 and a road coming out of Sunset Beach, North Carolina. The pickup was followed almost immediately by a blue '78 Pontiac Bonneville.

Q. All right, sir. Now, what time of day or night was this or morning, Mr. Cooke?

A. This was approximately 6:30 in the morning when I first met them.

Q. All right, sir. And what were the lighting conditions at that time?

A. It was just starting to get light, if I recall correctly. Headlights were on the vehicles, but it was light enough to be able to ascertain the coloration of the vehicles and to be able to see that there were two white males in the Pontiac and one white male in the Ford pickup.

Q. All right, sir. Were you able to observe anything else about the [41] Ford pickup you described as having a camper body on it?

A. When I passed it, it appeared to be riding very low in the rear. I say passed it, I actually met them. They were headed away from Sunset Beach and I was headed towards Sunset Beach on State Highway 86.

Q. It appeared to be what did you say?

A. Riding very low in the rear. It seemed to be in an overloaded configuration.

Q. Did you notice anything about the windows on the camper?

A. When I first met it, I did not; however, after meeting the truck and the car, I turned around the first available location to be able to make a U-turn and caught back up with the truck and the car at which time I could see the rear window of the camper of the truck. It appeared to be covered with a quilted type of material.

Q. All right, sir. What were you driving at that time? I believe you said your own car earlier, would you describe your car as to any markings or anything it might [42] have had on it, Mr. Cooke?

A. This was a 1975 two-door beige colored Oldsmobile with no particular markings on it at all.

Q. All right, sir. And what did you do after you turned around and caught back up with these vehicles?

A. The first thing that I noticed was the license tag on the Pontiac. The car had a South Carolina license tag on it which was ASC 446, I believe, and it also had a National Car Rental sticker on the rear bumper of the vehicle. The pickup truck also had a South Carolina tag on it. I was in communication with the Highway Patrolman in Conway over the State Highway Patrol radio and asked him to run the tag which I got from the pickup truck I was following. I was following them out road 1186 and eventually it led us out to Highway 17. The tag on the Pontiac I did not run because of the fact that it had the National Car rental sticker on the bumper of it.

[43] * * * * *

Q. You had the Highway Patrol run the tag on the truck, is that correct, sir?

A. Yes, sir, I did.

Q. And what if anything were you able to learn about the truck [44] from that license tag?

A. The vehicle registration came back to a subject by the name of H-U-C-K-S in Conway, South Carolina. And the only information available at that point was the name Willie S. Hucks from Conway on a 1976 Ford pickup.

Q. All right, sir. And what type pickup was it that you observed?

A. It was a 1976 Ford with a camper on it.

Q. All right, sir. Would you continue with what you did after you ran that check?

A. On leaving State Road 1186, we followed a route that led us directly to U.S. 17 in North Carolina by State Roads 1164 and 1165 coming out about ten miles from the first time that I had seen them. We ended up at the North Carolina-South Carolina state line. During this period of time I had come fairly close to both of the vehicles, the Pontiac and the truck, the truck being in the lead all of the time as we went out to Highway 17. I noticed the way the truck was handling itself, the fact that when it went [45] around curves it had absolutely no sway or bounce to it. Whatever bumps or waves that were in the roads, the vehicle still had no bounce at all to it and I continued to follow these two vehicles which ran in tandem all the way from where I initially encountered them down into South Carolina into the Myrtle Beach area.

Q. Approximately what distance was that in miles, Mr. Cooke?

A. From the time I initially encountered them, we drove approximately ten miles to the state line, another ten miles to the Atlantic Beach or North Myrtle Beach, South Carolina area.

Q. All right, sir. And during this period of time you were observing, you say, the way it took bumps and went around curves?

A. Yes, sir, that is correct.

Q. From your past experience what did that indicate to you?

A. The way the vehicle was handling on the bumps and the curves indicated to me it was loaded; that it did have a heavy load in it [46] because there was no bump or bounce or sway at all to the vehicle.

Q. All right, sir. Did you have occasion to contact anyone when you got in the Atlantic Beach area or in that area?

A. Yes, sir. As I approached the Atlantic Beach area, it was before seven o'clock, I passed Don's Pancake House which was right on the side of U.S. 17; and I asked the Highway Patrol dispatcher if he had any units working in

the area because I had seen a Highway Patrol car sitting at Don's Pancake House in Atlantic Beach when we passed. The dispatcher said that they had a unit coming on at seven o'clock at which point I asked him if he would attempt to contact the unit that was at Don's Pancake House with reference to him coming out to give me a hand on a possible stop of the vehicles.

Q. All right, sir. Was anyone with you at that time in your vehicle?

A. No, sir, I was by myself the entire evening or morning.

Q. All right, sir. And after you made this request, what if anything occurred?

[47] A. At this time we had come into a mostly commercial area of businesses. The street had gone from the two lane to a six lane street; and on approaching the traffic signals in the area at several of the lights I actually pulled alongside both the Pontiac and the pickup truck and had a better look at the entire configuration of the pickup. I was able to see it more clearly from both the front, the side and the rear. I noticed that it had a blue bedspread type of material over the side windows and the rear windows, as I mentioned earlier, were covered with quilted material, a white quilted material. I was also able to observe the occupants of both vehicles, the two gentlemen in the Pontiac and one man in the Ford pickup. As a result of my request to the Highway Patrol dispatcher in Conway, Highway Patrolmen Kenneth Thrasher—excuse me Patrolman Thrasher came on the scene, in the area, shortly before seven o'clock and advised me that he would be catching up with me very shortly; that he had seen me pass the area of Don's Pancake [48] House and he did catch up with us in the North Myrtle Beach area approximately twenty-one miles after I had initially encountered the two vehicles in North Carolina.

Q. All right, sir. Mr. Cooke, let's go back for a moment. You said you were able to when you got in the area where there were stoplights to actually pull alongside the pickup, the camper and the other vehicle, is that correct, sir?

A. Yes, sir, that is.

Q. And you say you got a better opportunity to look at the configuration of the pickup?

A. Yes, sir.

Q. All right, sir. What were the lighting conditions by that time, sir?

A. It was full daylight by that time.

Q. All right, sir. You say there was a blue type material over the side windows?

MR. TURNER: Please Your Honor, this is repetitious. He's testified to every bit of this.

[49] THE COURT: That's all right. Go ahead.

A. Yes, sir. It was a blue cloth material, bedspread looking material over the side windows.

Q. All right, sir. How many campers have you previously in your experience as a Drug Enforcement Agent seen a load of marijuana, Mr. Cooke?

A. In the last five years since I've been in the Charleston area, I would say probably in excess of eighty.

Q. All right, sir. And what if anything is common to thoe vehicles?

A. Ordinarily the curtains on a standard camper will be matching curtains set up by a family to use a camping vehicle. Most of the marijuana load vehicles that I have encountered have had mismatched curtains, curtains on sideways, different types of window coverings from front, back and rear; and in this instance the bedspread material was hung not in a vertical position, but in a horizontal position as far as the lines in it were concerned.

Q. All right, sir. What if anything did you notice about the configuration [50] as to weight distribution?

A. The front of the pickup, the wheel well for the front wheels of the pickup appeared to have an excessive amount of space between the top of the tire and the fender itself. In the rear there was very little difference in the top of the tire and the fender itself; and the vehicle appeared to be riding in a very rear end lower and front end higher position.

Q. You say Mr. Thrasher caught up with you?

A. Yes, sir, he did.

Q. What occurred after he caught up with you?

A. After Mr. Thrasher caught up with us, we continued to follow them as I conversed with Mr. Thrasher and attempted to tell him what I had encountered, where I had been. We were headed south on U.S. 17 and had almost made the decision, I had almost made the decision to stop the vehicles had they made a turn off U.S. 17. They turned into the road that was designated by a large sign that indicated Lake Arrowhead Campground; and being somewhat [51] familiar with that area, I knew there were several campgrounds along that particular road. I asked Mr. Thrasher to hold off for just a few minutes so we could ascertain whether or not these vehicles did in fact turn into one of the campgrounds on that road. We followed them and at that point I believe the Pontiac had gone into the lead somewhere in the commercial area. The Pontiac pulled ahead of the pickup truck and when they turned into the area, the campground road, the Pontiac was I believe leading the Ford pickup. The vehicles did not turn into any of the campgrounds located along that particular road; and about three miles later or between two and three miles after we turned off of Highway 17, we actually made a loop and came back to U.S. 17 and again turned south on U.S. 17.

THE COURT: That's everybody, the pickup? I mean the Pontiac, the pickup, you and the Highway Patrolman?

THE WITNESS: Yes, sir.

[52] THE COURT: You made a loop and came back on 17?

THE WITNESS: Yes, sir, we did.

Q. All right, sir. What if anything, Mr. Cooke, do you recall was the speed limit in that campground area?

A. I believe it's thirty-five miles an hour on that campground road.

Q. All right, sir. Do you recall what speed you were traveling at?

A. Most of the time we were running somewhere around fifty to sixty miles an hour.

Q. You made a loop back out to 17, is that corect?

A. Yes, sir, we did.

Q. And all four vehicles proceeded south?

A. Yes, sir. All four vehicles turned south on 17.

Q. All right, sir. What occurred next?

A. At that point I had asked Mr. Thrasher what he thought about the way the truck was riding and whether or not he had cause to stop [53] them himself at that point. He indicated to me he did. As we turned on to 17 I asked Mr. Thrasher if there was any place there that we could safely stop the vehicles, indicating that we needed to get off the road if possible. He told me that there were a couple of parking lots within a short distance from where we had turned back onto Highway 17. At that point I asked him if he would go ahead and stop the vehicles. Again we were back out on a six lane road. We were at that point running in the center of the three right-hand lanes with the Pontiac in front, the pickup truck, my vehicle and then Mr. Thrasher in his Highway Patrol car. I asked him to stop the vehicles, which he attempted to do by pulling into the left lane. He turned on his blue light as he came alongside the Pontiac.

Q. The Pontiac was which vehicle? Was it the truck or Pontiac?

A. The Pontiac was the lead vehicle at that point. Mr. Thrasher pulled alongside the Pontiac, turned on his blue light and motioned them over to the side of the road. The Pontiac started over to the right and as he moved into the right-hand lane, Mr. Thrasher started to move [54] over also and the Ford pickup cut between the two vehicles, between the Highway Patrol car and the Pontiac and proceeded on down the road. Mr. Thrasher told me to get the Pontiac. He told me that he would get the truck.

Q. All right, sir. And did you—what did you do after Mr. Thrasher told you to get the Pontiac?

A. The Pontiac pulled into an independent service station parking lot and I pulled in immediately behind it; set a blue light on the dash of my vehicle; got out; walked over to the Pontiac and identified myself to the driver of the vehicle who was Mr. Sharpe and asked him for any identification or asked him for his identification or driver's license at that point. Mr. Sharpe handed me a driver's license in the

name of Raymond J. Pavlovich. I'm not exactly sure what the pronounciation is, with a Georgia driver's license.

MR. SIMPSON: Your Honor, without objection we offer this.

THE CLERK: Government's Exhibit 1.

(whereupon Govrnment's [55] Exhibit 1 is received and marked in evidence.)

MR. KADISH: Your Honor, we'll be more than happy to stipulate the driver's license was given to the Agent at his request.

* * * * *

Q. What occurred next, Mr. Cooke?

A. At that point after ascertaining the initial identification which was given to me by [56] Mr. Sharpe and there was another subject in the vehicle by the name of Davis, I asked them to stand there outside the automobile while I went back to my own car and attempted to recontact Mr. Thrasher to see whether or not he had in fact been able to stop the pickup truck. For several minutes due to the fact that Mr. Thrasher was out of his car apparently and I had been in and out of mine, we were unable to reestablish contact for a few minutes. And then through the Highway Patrol dispatcher I was able to make contact with Mr. Thrasher. He advised me that he had been able to stop the vehicle at Highway 17 and 62nd Avenue, which was roughly a half a mile from where I had stopped with the Pontiac.

Q. All right, sir. At that time did you seek any assistance from any other police officer?

A. Yes, sir. In conversations with the Highway Patrol dispatcher I had attempted to contact the North Myrtle Beach Police Department and about this time the stop actually occurring sometime between 7:10 and 7:15, about 7:20 or 7:25 a marked unit from the Myrtle Beach Police Department arrived at my location. I asked the two uniformed [57] officers if they would stay with Mr. Sharpe and Mr. Davis while I went up to see where Mr. Thrasher was and to ascertain the circumstances at that location. The officers from Myrtle Beach Police Department did remain at the area there at the service station with the Pontiac and the two

subjects. I proceeded down south on 17 about a half a mile to where Mr. Thrasher had stopped with the blue Ford pickup truck and at that point noted Mr. Thrasher standing between his vehicle and the Ford pickup with Mr. Savage.

Q. All right, sir. When you got there what if anything did you do about identifying yourself?

A. Immediately on arriving at that location I identified myself to Mr. Savage as a D.E.A. Agent and Mr. Thrasher handed me the papers which had been given to him or which he had with reference to the vehicle, the ownership of the truck which he had stopped.

MR. SIMPSON: We offer this.

THE CLERK: Government's Exhibit 2.

(Whereupon Government's [58] Exhibit 2 is received and marked in evidence.)

Q. Mr. Cooke, I hand you what I have stapled together, two plastic envelopes marked as one Exhibit, Government's Exhibit 2, and ask you if those are the papers that Mr. Thrasher handed you?

A. Yes, sir, they are.

Q. They indicated the truck was purchased on what date?

A. They indicate the truck was purchased on June the 8th, 1978 in Myrtle Beach, South Carolina by J. R. Pavlovich, address 5914 Lakeside Drive, Atlanta, Georgia. The signature at the bottom is R. J. Pavlovich.

[59]; * * * * *

Q. Mr. Cooke, did you note anything about the name appearing on the purchase papers for the vehicle that Mr. Thrasher handed you?

A. Yes, sir. The name on the purchase papers are identical with the name on the driver's license, which had been given to me by Mr. Thrasher [sic] when I had asked for his identification back at the Pontiac, when I had stopped with the Pontiac, with the minor exception: I believe the bill of sale there is made out to J. R. Pavlovich and the signature on it is R. J. Pavlovich. The [60] driver's license is in the name of Raymond J. Pavlovich.

Q. After you examined Government's Exhibit No. 2, what did you do next?

A. I asked Mr. Thrasher who Mr. Davis was and at that point Mr. Thrasher produced Mr.—I'm sorry, I asked him who the man was, Mr. Savage, and Mr. Thrasher produced the driver's license which he had retained or which he had in his possession at the time. I explained to Mr. Savage that what I had been doing during the night and I explained to him that I inspected the truck—

THE COURT: Excuse me one minute. I didn't catch what you said about the driver's license. You mentioned about the driver's license. You asked the driver for his driver's license?

THE WITNESS: No, sir. The Highway Patrolman had Mr. Savage's driver's license at that time. I simply looked at the driver's license and returned it to the Highway Patrol.

THE COURT: What [61] name was that?

THE WITNESS: That was Mr. Savage. I believe Mr. Savage had his own Georgia license. I believe that was it at the time.

Q. You say you explained to Mr. Savage what you had been doing, is that correct?

A. Yes, sir. And I explained to him that I thought that particular vehicle, the Ford pickup was probably loaded with marijuana at the time. I asked him for his permission to look into the rear of the vehicle. He explained to me that he was not the owner of the vehicle. I asked him if he knew where the owner was. He said he did not. I told him that I knew where the man by that name was. I asked him again for permission to look into the rear of the truck, which he did not give me. At that point I stepped up to the back of the truck and stepped up on the rear bumper of the truck.

Q. Why did you step on the rear bumper, Mr. Cooke?

A. In order to confirm what I had noticed as we were driving down the thirty mile [62] drive from North Carolina down to Myrtle Beach, the fact that the vehicle did not have any bounce or give to it as it hit the bumps. I weighed close to two hundred pounds. I put my entire weight on the rear bumper of the vehicle and did not notice any apprecia-

ble change in the rear bumper as far as the proximity to the ground was concerned.

Q. All right, sir. After you stood on the bumper what did you do next?

A. Next I got back off the bumper and then leaned down towards the tailgate of the camper, the camper shell itself, leaned up next to the rear window of the camper there on the rear door window combination and took a deep breath, smelled a very strong and distinct odor of marijuana.

Q. All right, sir. What do you base your opinion that was the odor of marijuana, Mr. Cooke?

A. The smell of marijuana that I have encountered probably in excess of two hundred thousand pounds within the last two years, preceding that particular time.

[63] Q. All right, sir. And after you, as you say smelled marijuana, what did you do next?

A. At that point I walked around to the driver's portion of the pickup, took the keys from the ignition, returned to the rear of the camper, opened the camper shell door and inside saw a large number of burlap covered bags, some of which had sand on them, some of which were a little bit damp and noted that they appeared similar to the large number of bales of marijuana that I have encountered over the last number of years.

Q. All right, sir. And what happened next, Mr. Cooke?

A. At that point we—I advised Mr. Savage that he was under arrest and I asked Mr. Thrasher to maintain custody of him while I went back north on 17 to the Pontiac where Mr. Sharpe and Mr. Davis were located. I returned to the Pontiac and at that point advised Mr. Sharpe and Mr. Davis that they were under arrest.

[65] * * * * *

Q. All right, sir. Mr. Cooke, did you supervise the unloading of that truck? Was it done under your supervision?

A. Yes, sir, it was.

Q. What did that truck contain insofar as the number of bales?

A. The truck contained forty-three bales of marijuana weighing a total of two thousand [66] six hundred twenty-nine pounds.

Q. All right, sir. What procedure did you follow relative to any identification of what was on the truck, sir?

A. In our normal procedure with large seizures of marijuana we remove the bales of marijuana from the truck. We took eight bales initially and cut small holes in the bale, took small subsamples from the eight bales, photographing the entire scene, the entire seizure as we went along, including the eight bales with pictures of the small subsamples. We retained two complete bales from which subsamples had also been taken by the eight subsamples. Those subsamples were forwarded to our Southeastern Regional Laboratory in Miami for analysis. The two bales that we retained as evidence were stored in the evidence vault at my office and the remaining bales were destroyed by fire at a local facility here in Charleston.

Q. All right, sir. How were the eight bales that were sampled selected?

A. They were merely pulled out from the forty-three bales that were in the truck. I or the [67] Agent working with me helping unload the truck would say that looks like a bale that we could take a sample out of. So we would take a sample from one of the bales at random, taking a sample out of the truck.

Q. They were taken at random?

A. Yes, sir.

Q. Did all the bales appear similar in the way they were packed?

MR. TURNER: Leading.

MR. SIMPSON: I withdraw the question.

Q. How were they packed?

A. All of the bales in this particular vehicle were very uniform in appearance. They had a highly compressed configuration to them. If you start with the outside, the outside wrapper was a burlap bag which was tied off with hemp twine. Inside that was a clear white plastic bag which had been taped down. Inside the white plastic bag were two Kraft paper bags each of which was tightly wrapped

around a large tube of [68] marijuana. The bales themselves weighed from about forty-nine to fifty-six, fifty-seven pounds each.

Q. All right, sir. I believe you said eight samples were submitted by—to your regional lab in Miami, is that correct?

A. Yes, sir, that's correct.

Q. As case agent, you received back a report on those samples?

MR. TURNER: Your Honor, we will agree those samples were tested and were positive for marijuana.

[70] * * * * *

Q. You first came across the camper at approximately 6:30 A.M. on June 9, is that correct?

A. Yes, sir. 1978.

Q. Is it—strike that. By 6:50 A.M. that morning you had made the decision that you wanted to stop the camper, didn't you, by 6:50 A.M.? You wanted to stop the camper and the car?

A. I had made an initial determination that I would probably want to stop the car and the truck.

Q. Okay. I'd like to call to your attention the preliminary [71] hearing transcript at page ten. First of all do you remember testifying at a preliminary hearing before Magistrate Carr which was held on June 26th, 1978 here in Charleston?

A. Yes, sir, I do.

Q. Do you happen to have a copy of that in front of you?

A. Yes, sir. I've just been handed a copy of it.

Q. Do you remember making at page 10 this statement, lines 11 through 14 "I had just passed a restaurant where I had noted a Highway Patrol car parked and I asked the dispatcher to call the restaurant and ask the man to come on the area and give me a hand because at that point I wanted to stop the two vehicles."

Do you remember giving that answer to the question that was posed to you that day?

Q. You didn't state probably, did you, in that answer?

A. At that time I did not have the exact time of day available to me.

[72] Q. What I'm asking you is this question: at the time you gave that answer you did not use the word probably want to stop the vehicles, did you?

A. That is correct.

Q. You said you wanted to stop the two vehicles?

A. That is correct.

Q. Indeed the purpose for summoning the Conway dispatcher at approximately 6:50 that morning was to get assistance to stop the vehicles, wasn't it?

A. The review of the time indicates it was 7:56. The purpose was to obtain assistance in the stop of the vehicles, yes.

Q. Your testimony now is that the first time you had contact with the Conway dispatcher was at 7:56?

A. I'm sorry. 6:56, approximately.

Q. So when I said 6:50 a moment ago I was off by six minutes, wasn't I?

A. Yes, sir, you were.

Q. So by 6:56, Agent Cooke, you had made the decision to call the [73] dispatcher so that he could get you assistance to stop the vehicles, hadn't you?

A. Basically, yes, sir.

Q. All right. Now at that point your testimony was you had been following the vehicles for some perhaps ten, eleven miles, correct?

A. Twenty miles.

Q. Twenty miles?

A. Yes, sir.

Q. Are you saying that you made the contact with the Conway dispatcher around the City Limits of North Myrtle Beach, is that what you're saying?

A. I was in the vicinity of Atlantic Beach.

Q. What was the distance between the vicinity of Atlantic Beach and the first time you saw the camper, how many miles?

A. Twenty miles.

[75] * * * * *

Q. I show you Defendant's Exhibit 1 and ask you if you can identify it?

A. Yes, sir, this is a report that I wrote.

Q. And that report consists of a transcription of the tape that was made by the Conway dispatcher in the course of his conversations with you on the morning of June 9, 1978, isn't that correct?

A. Yes, sir, that is correct.

Q. And did you personally make that transcription?

A. Yes, sir, I did.

Q. Did you listen [76] to the tape very carefully when you made it?

A. Yes, sir, I did.

Q. Is it accurate and true to the best of your knowledge?

A. To the best of my knowledge it is.

Q. Have you since learned of anything that would cause you to change anything in that transcription that you made?

A. No, sir, there is not.

Q. I notice that on the transcription there is a series of times that are written in the margin. The first is 6:36 A.M. Is that time the correct time?

A. According to the computerized tape run from the Highway Patrol facilities, that would be the correct time.

Q. At 6:53 A.M. there is a reference here to 9/7/3. I take it you are 9/7/3?

A. Yes. On the Highway Patrol frequency. That's my assigned call number.

Q. 9/7/3, do you have any units working in the Myrtle Beach area and he says say again, which area? You say in the [77] Myrtle Beach-North Myrtle Beach area I don't have any working right at the moment, but I have somebody coming on pretty soon at 7 o'clock who ought to be out and in time, do you remember that conference between you and the dispatcher?

A. Yes, sir, I do.

Q. Were you not asking for someone in the Myrtle Beach area because you intended at that time to stop the vehicles in the Myrtle Beach area?

A. No, sir, I did not.

Q. What was the purpose then in asking for the assistance?

A. The purpose for asking for the assistance was I did want to stop the vehicles. As far as stopping them in the Myrtle Beach area, that was not exactly anything I had in mind at the time.

Q. Now, up to that time that you had observed the vehicle for this now you say twenty miles, you had not made any determinations whatsoever that the vehicles were involved in any kind of traffic situation, had you, traffic violation, had you?

A. No, sir, I had not.

* * * * *

[79] Q. At the time you made your U turn, you had no knowledge whatsoever that the Pontiac was a rental car, did you?

A. No, sir, I did not.

Q. At the time you made your U turn you had no knowledge whether or not the people in the car had any affiliation with the people in the truck, did you?

A. No, sir, I did not.

Q. You did not see any signaling between the people in the car and the person in the truck, did you?

A. No, sir, I did not.

Q. You did not see any evidence of radio communication between the people in the truck and the people in the car when you made the U turn, did you?

A. No, sir, I did not.

Q. Indeed for the entire trip, for all I think you said thirty miles of it, you never saw any signaling between the people in the car and the person in the truck, did you?

[80] A. No, sir, I did not.

[83] * * * * *

Q. At the time that you began to converse with Agent 93 or Patrolman Thrasher, all you knew about the camper or pickup camper was that it was registered to a Mr. Hucks in Conway, isn't that true?

A. As far as the registration of the vehicle is concerned, yes, sir.

[85] * * * * *

Q. Did the man drive in any erratic fashion during the time you were following him? What I mean by that is did he take evasive action to try to get away from you?

A. I think I would say evasive in the route off Highway 17 and the three mile run back to Highway 17 as we went down Campground Road, that I would say was evasive, yes, sir.

Q. Other than that one turn and that one short loop, was there anything that was evasive?

A. No, sir.

Q. During the time of the loop did the camper dart off down a side road or anything like that?

A. No, sir, it did not.

Q. Now, during the time of the loop was there any unusual happening or did you observe any communications between the camper and the car?

A. No, sir, I did not.

[89] * * * * *

Q. Now, when the car was pulled over it went into an independent gas station, you said, is that correct?

A. Yes, sir.

Q. Did the occupants do anything to take any evasive action at that time?

A. No, sir.

Q. They didn't jump out of the car and try to run, did they?

A. No, sir.

[99] * * * * *

Q. Now, in any event, you left the men in the custody of the Myrtle Beach police officers and you went up the road to see Agent E-93 and Savage and Thrasher?

A. Yes, sir.

Q. From the transcript that you did, Mr. Cooke, we know that the stop of the car, the stop of the car occurred somewhere around 7:10, is that not correct, give or take a minute or two?

A. Yes, sir, that's correct.

Q. It might have been 7:08, it might have been 7:09 or 7:10 or 7:11, correct?

A. Correct.

Q. During that period of time you overheard the dispatcher trying to reach E-93 to see if he had successfully

pulled the pickup truck over, didn't you? You heard that on the radio, didn't you?

A. Yes, sir, I did.

Q. You yourself [100] tried to reach Thrasher?

A. Yes, sir, I did.

Q. For a while you couldn't get him?

A. That's correct.

Q. And the minutes were ticking away; and would you say it was maybe 7:15 before you reached them, thereabouts, give or take a minute or two?

A. I can check the transcript, if you like.

Q. Go ahead. Okay? What time did you ultimately reach Thrasher by radio?

A. The stop was made sometime between—right at 7:12. My next contact with Mr. Thrasher was sometime around 7:20, 7:21.

Q. So at this time approximately twelve minutes had gone by, correct?

A. Yes, sir.

Q. And these two men are under your control at that time, all during that time, correct?

A. They are there at their automobile with me, yes, sir.

[101] Q. Now, we are at 7:23. Is it not fair to say, as I think you just testified a few moments ago, that at least another ten minutes went by before the Myrtle Beach Police Unit arrived, give or take a minute or two?

A. Ten minutes from when?

Q. From 7:23.

A. No. It was probably more in the neighborhood of five minutes. I don't think it was as long as ten minutes before the marked car unit got there.

Q. That brings us at any rate to fifteen or sixteen minutes of time, does it not?

A. Yes, sir.

Q. Now, that would bring the time up to about 7:28, correct?

A. Yes, sir.

Q. Now, the tape ends at 7:30, does it not?

A. That is correct.

Q. If you will look at the tape which I think you have in front of you, the last things you are talking about [102] there are contacting some people at Mar Vista, are you not?

A. Yes, sir.

Q. And those people at Mar Vista were other D.E.A. agents?

A. There was one D.E.A. agent there; people from Customs; people from State Law Enforcement Division; I don't know who all was there.

Q. Do you know where you were at 7:30? Can you tell from the tape where you were? Answer that first question first.

A. No, sir, I cannot.

Q. You might still have been at the car, correct?

A. According to the tape it's impossible to tell.

Q. You don't have a clear recollection, do you, where you were, whether you were at the car or truck at that time?

A. Yes, sir. By 7:30 I was up by the truck.

Q. Do you think you were riding up to the truck when you made [103] this communication at 7:30?

A. Very possibly, yes.

Q. Assuming you get to the truck around 7:30 or 7:32 and the stop was about 7:10, so now we're about somewhere between twenty and twenty-five minutes have elapsed, hasn't it, somewhere—

A. Approximately twenty minutes.

Q. All right. Now, you're at the truck. When you arrive at the truck is Savage in or out of the vehicle?

A. He's out of the vehicle.

Q. Thrasher has his license?

A. Yes, sir.

Q. You request the registration, do you not?

A. No, sir. Patrolman Thrasher gave it to me.

Q. You requested it from him, didn't you?

A. He handed it to me when I arrived.

[104] * * * * *

Q. Now, you described earlier some conversation you had with Mr. Savage, correct?

A. Yes, sir.

Q. You said that he, in response to your question I know or in response to your statement, I am convinced that there is marijuana in the rear of your truck; [105] can I search it; he said no, didn't he?

A. Yes, sir, he did.

Q. Then you asked him again, you said I'm convinced there is marijuana in your truck; can I search it; again he said no, didn't he? Twice this happened?

A. During the period of the conversation I believe it did happen twice.

Q. You said there was a period of conversations, I know those two things didn't come right after each other, would you say this period of conversation lasted about five minutes where you tried to persuade him to let you look in the truck?

A. The conversation lasted approximately five minutes. I was attempting to get his verbal permission to look at the back end of the truck.

Q. That takes us maybe to thirty or thirty-five minutes of time all tolled since the car was stopped, is that a fair statement, about then? By your own testimony you were adding another five minutes?

A. Twenty-five to thirty minutes.

[112] * * * * *

Q. Was one of the first things you did was to walk up to the rear and take your foot and put it on the bumper and then put both feet on the bumper holding onto [113] the vehicle somehow and trying to move up and down on it?

A. Yes, sir. That is one of the first things I did at the truck.

Q. Prior to this time when you got up on the vehicle and touched it with your feet and shook it, you had not smelled any odor of anything, had you?

A. At that point I had not tried to smell anything, anything close to the vehicle prior to that. Prior I didn't go near it.

Q. You didn't smell anything prior to going up to the vehicle and shaking it?

A. Prior to that, no, sir.

Q. Did you then test the handles to see if they were open or shut?

A. No, sir, I did not, not at that point.

Q. Did you do that after you sniffed?

A. Yes, sir, I did.

Q. And was it locked?

A. Yes, sir, it was.

[114] Q. Would you say that this process took approximately three to four to five minutes?

A. Maybe one.

Q. One minute?

A. One or two.

Q. Walking toward the car getting up with your feet and the rest of it?

A. Yes, sir.

Q. You then announced to Mr. Savage that you wanted to get his keys, did you do that?

A. No, sir, I did not.

Q. You went right to the keys, took it out of the ignition and opened the latch, did you not?

A. I believe I told Mr. Savage that that is what I was going to do.

Q. At that time, two times he had told you not to enter his vehicle, didn't he?

A. Prior to that time, yes, sir.

[115] * * * * *

THE COURT: Let me stop you. Maybe I was reading something and missed a part of it. I don't think so. You stepped on the bumper. You didn't smell anything. You said at the time you hadn't smelled any odor of anything at the time you put your foot on the bumper?

THE WITNESS: No, sir. At that time I just walked straight up to the truck.

THE COURT: Then what did you do when you put your foot on the bumper?

THE WITNESS: That took approximately five to ten seconds. I got up off the bumper, put my nose to the back end of the camper and took a deep breath and smelled the marijuana inside the truck at that time.

THE COURT: Then you went [116] and asked for the keys?

THE WITNESS: I did not ask for the keys. I possibly asked Mr. Thrasher for the keys and he indicated they were in the ignition. I honestly do not remember that sequence; however, I did get the keys from the ignition of the truck, went around and opened the rear end of it myself.

THE COURT: All right, sir. Thank you.

Q. Now, you opened the door, you saw bales?

A. Yes, sir.

Q. Just like they're depicted in the pictures that have been offered by the Government, true?

A. Yes, sir.

Q. No bales were punctured, were they?

A. No, sir, not at that point.

Q. There was no residue on the floor of that vehicle when you took the bales out later that day, was it?

A. That's correct.

Q. You opened the [117] door, you saw the bales, you saw no residue, you saw no puncture, you saw nothing but bales, you turned to Savage and said you're under arrest, right?

A. Basically, yes.

Q. What for?

A. Possession of marijuana with intent to distribute.

Q. Had you seen marijuana?

A. I had seen approximately forty-three bales in a configuration that was similar to the numerous hundreds of thousands of bales or pounds that I have seen in the last several years, smelled the distinct odor of marijuana at that point and placed him under arrest at that point for possession of marijuana with intent to distribute. I had not physically looked inside the bales themselves at that point.

Q. The question gets a simple answer. You didn't see any marijuana at the time of the arrest, did you?

A. I had not seen it at that time, no, sir.

[119] * * * * *

Q. At this point you were interested in getting back to the scene where the car was with the Myrtle Beach units, weren't you?

A. That is correct.

Q. So all of this that you have just described, going to get the key out of the ignition, the opening of the car, telling Savage he was under arrest, leaving [120] instructions with Thrasher and so forth, would you say that consumed at least five or six minutes, that whole thing, from the moment you started doing that?

A. The moment I arrived to the moment I left I spent less than ten minutes.

Q. That would bring us up to maybe a total now of thirty-five to forty minutes, in that vicinity?

A. Somewhere between thirty and forty minutes.

Q. How long did it take you to drive back to the car, another minute or two?

A. Thirty seconds.

Q. When you got back to the car, you advised them that they were under arrest, correct?

A. Yes, sir, that is correct.

Q. For what?

A. Conspiracy to possess and distribute marijuana.

[125] * * * * *

Q. I see. Now, at the time you made the decision to stop the vehicles—which decision you testified to earlier today, your decision to stop was based on a profile situation as you described it at the preliminary hearing, wasn't it? I believe one of the Defense Counsels described it that way?

A. Yes. I believe one of the Defense Counsel described it as a profile search for me at that time.

Q. You agreed to it, didn't you?

A. I agreed to it, yes.

Testimony of Kenneth Calhoun Thrasher—July 31, 1979

[137] * * * * *

Q. All right, sir. What primarily on June the 9th, 1978, were your duties and where were you stationed?

A. I was stationed in Horry County. I was assigned to work the Myrtle Beach area that day shift.

Q. And primarily what do your duties entail as a member of the Highway Patrol in the Myrtle Beach area?

A. Patrolling the highways, investigating accidents.

* * * * *

[138] Q. All right, sir. When you contacted Mr. Cooke, what if anything did he advise you?

A. He stated that he had been behind a car and a pickup with a camper on it since—up in North Carolina and that he was interested in the truck and believed that the car was traveling with the truck.

Q. All right, sir. And did he advise you what his location was at the time you went on the area?

A. He did. He was several miles south of me, about two or three miles.

Q. Did he advise you what Highway he was on?

A. He did. He was on Highway 17.

Q. What if anything did he ask you to do?

[139] A. They had told me on the telephone to catch up with him whenever I got in the car.

Q. Okay. Did you in fact catch up with him?

A. Yes, I did.

Q. All right, sir. If you would, describe for the Court the situation on Highway 17 when you caught up with Mr. Cooke; where were the various vehicles that were involved in this litigation?

A. There was a Pontiac and a camper and Mr. Cooke's car in one line headed south on 17 just outside of the North Myrtle Beach city limits.

Q. Which was the lead vehicle?

A. The blue Pontiac.

Q. All right, sir. And where was the camper?

A. Right behind it.

Q. And how close a proximity was it?

A. A car length or two. He was right close behind it.

Q. Where was Mr. Cooke?

[140] A. Right behind the pickup truck.

Q. How close was he to the pickup, would you say?

A. A couple of car lengths.

Q. Was there much other traffic on the Highway that morning?

A. Not a whole lot. It was not too heavy because I had exceeded the speed limit a good bit catching up with him.

Q. All right. After you caught up and found this convoy, for want of a better word, what did you do?

A. I dropped in behind them, dropped behind Mr. Cooke and we followed them down the Highway.

Q. All right, sir. During this period of time were you in radio contact with Mr. Cooke?

A. I was.

Q. All right, sir. And what if anything did you discuss with Mr. Cooke as you were proceeding south on 17?

A. He asked me if I thought the truck might be overloaded, if it was setting funny. It did look like it had quite a load on it.

[141] Q. Okay. And did he ask you anything else?

A. I asked him if he wanted me to try to stop it then and he said to wait a little while.

Q. Okay. Now, as you were proceeding south on 17, did all the vehicles continue on 17 south?

A. No, sir. We turned off on the Lake Arrowhead Road.

Q. All right. For the record and the Court describe the Lake Arrowhead Road?

A. It makes a loop sort of parallel to 17. It's about two miles or so, then turns back to the right and it comes back out on Highway 17 about a mile from where they turned off of Highway 17.

Q. All right, sir. How long after you had fallen into the convoy did this exit of Highway 17 take place?

A. About one minute because it's right at a mile after I caught up with them where they turned off.

Q. All right, sir. [142] And what if anything happened after they turned off?

A. The speed limit on that particular road was thirty-five due to several campgrounds and trailer parks through there and they continued to run along there at fifty-five up to sixty miles an hour.

Q. All right, sir. And where were you and Mr. Cooke during this period of time?

A. Right behind them.

Q. All right, sir. Were there any other cars mixed into the convoy, so to speak, as you went down the Lake Arrowhead Road?

A. No, sir.

Q. It was still the Pontiac, the truck, Mr. Cooke and yourself?

A. Yes, sir.

Q. All right, sir. And what happened after they made the loop through the camp or the Lake Arrowhead Road?

A. They pulled up to the traffic light back on Highway 17 and made a left turn and continued south on Highway 17.

[143] Q. All right, sir. At any time did either vehicle stop at any of the campgrounds or inquire of any camping facilities in the area?

A. No, sir.

Q. At any time did any of the vehicles slow down going through the Lake Arrowhead Road?

A. They had to stop at a stop sign at one of the campgrounds to make the right turn to get back to 17.

Q. All right, sir. Other than that were there any other stops?

A. No, sir.

Q. All right, sir. What happened after you got back to 17?

A. They continued south and started into the city limits of Myrtle Beach.

Q. When you say they, you're referring to what?

A. The four of us, the Pontiac, pickup truck, Mr. Cooke and myself.

Q. Are we still in the same line?

A. Yes, sir.

[144] Q. Same positions?

A. Yes, sir.

Q. All right, sir. After we're back on 17 now and we're headed south again, what next occurred?

A. We got in Myrtle Beach and told Mr. Cooke there was some parking lots on the Highways a little ways and he said to try to stop both vehicles together to get them in the parking lot. So as we approached around 65th Avenue or so, I pulled out and passed everybody and motioned—turned the light on, motioned for the Pontiac to pull over which it did and tried to get the pickup truck stopped, too, but he continued south.

Q. At the time you pulled out and put your blue light on, what positions were the vehicles in?

A. The Pontiac, pickup truck and Mr. Cooke.

Q. What position was your vehicle in at the time you put your blue light on in relationship to the Pontiac and the blue truck?

A. I was alongside the Pontiac.

[145] Q. All right, sir. And where was the blue truck?

A. Behind the Pontiac.

Q. And how did you affect the stopping of the Pontiac?

A. I pulled alongside of him, turned the blue light on. I believe I blew the siren and motioned for him to pull over.

Q. Did he pull over?

A. He did.

Q. Now, what did the blue truck do?

A. He continued south almost hitting my car and Mr. Cooke said he would stay with the Pontiac. So I went on and stopped the truck a few blocks south.

Q. All right, sir. And how did you perfect the stopping of the truck on south Highway 17?

A. I believe I pulled up—finally got up alongside of him and still had the blue light on and motioned him over. He pulled over on Calhoun Drive and 17.

Q. All right, sir.

[146] MR. TURNER: I'm sorry. I couldn't hear.

THE COURT: Calhoun Drive and 17 he pulled over.

MR. TURNER: Thank you.

Q. After you stopped, after you stopped the pickup what did you do?

A. I stepped out of the car with my revolver drawn and the subject turned out to be Mr. Savage stepping out of the truck. And I asked him to put his hands up and I searched him. I holstered my revolver.

THE COURT: You searched him and what?

THE WITNESS: Searched him and holstered my revolver.

Q. All right, sir. What if any identification did you request?

A. I requested the driver's license and the vehicle registration or papers for the truck.

Q. All right, sir. And what if any driver's license and registration papers were produced?

A. He presented a Florida driver's license [147] and bill of sale from Coastal Motor Company dated the day before.

Q. All right, sir. Do you recall what name that was in?

A. The driver's license was in Savage and the bill of sale was in Tablovich, however it's pronounced.

Q. After he produced the driver's license and bill of sale, what next happened?

A. I questioned him about the bill of sale, who did the truck belong to, because the bill of sale was made out to Atlanta, Georgia, an Atlanta, Georgia address. It had South Carolina tags on the vehicle and he was from Fort Lauderdale or Fort Myers, Florida, somewhere in Florida.

Q. Okay. And what if anything did he tell you?

A. He said the truck belonged to a friend and the shocks on it were broken and he was taking it to get it fixed.

Q. And where was Mr. Cooke at this time?

A. He was back up the Highway with the [148] other vehicle.

Q. All right, sir. After Mr. Savage told you that the truck belonged to a friend and the shocks needed fixing, did you have any further conversation with him?

A. I told him that he had been speeding back through the campgrounds, which he denied. He said I hadn't been behind him.

MR. KADISH: I'm sorry.

THE COURT: Talk a little louder. You told him what?

THE WITNESS: I told him he had been speeding through the campgrounds. He denied that and said that I had not been behind him but just a little while.

Q. He said you hadn't been behind him as he was going through the campgrounds?

A. Yes.

Q. What else?

A. I told him Mr. Cooke was back at the other car and he would be down to where we were in just a few minutes.

Q. Did you tell [149] him who Mr. Cooke was?

A. Yes.

Q. What did you tell him?

A. I told him he was with the Drug Enforcement Agency.

Q. After you advised Mr. Savage that Mr. Cooke would be there in a minute and that he was with the Drug Enforcement Administration, what if anything next happened?

A. He got a little nervous and wanted to leave.

MR. TURNER: May it please the Court, I object. That's a conclusion.

THE COURT: I think you can testify if somebody is nervous. The Witness may do that.

MR. TURNER: My objection was to his saying he got nervous and wanted to leave. I think that conclusion is beyond the observer's conclusion.

THE COURT: What indicated he wanted to leave? Did he say something?

THE WITNESS: He said [150] he wanted his driver's license back, that he wanted to go.

Q. After he said he wanted to have his driver's license back because he wanted to go, then what next happened?

A. I told him he couldn't right then.

Q. What else did you tell him or after telling him that what did he tell you?

A. I don't remember. It was just a couple more minutes till Mr. Cooke got down there.

Q. All right, sir.

A. I did ask him what was in the truck.

Q. Okay.

A. And he said that it was empty.

Q. Did you have any further conversations with Mr. Savage about his wanting to leave?

A. I don't believe so.

Q. At any time during your conversations with Mr. Savage was any money mentioned?

A. Not at that time.

Q. All right, sir.

A. There was later.

[151] Q. Okay. Had Mr. Cooke arrived at that time?

A. Yes, sir.

Q. Okay. So after you had refused to give him his driver's license back, then you had some idle conversation, then Mr. Cooke arrived, is that the sequence of events?

A. Yes.

Q. What happened after Mr. Cooke arrived?

A. He asked Mr. Savage if he could look in the back of the truck. He told him, no, that it was empty. Mr. Cooke stepped up on the steps bumper. It had the big bumper on the back of the camper and he told him the shocks were broken and he jumped up on the bumper and the truck just sat there. It didn't move. And he asked him again if he could look inside and he told him no. And Mr. Cooke smelled around the windows of the camper and then he took the keys from the ignition and opened the back window, the back gate of the camper and there were some bales stacked up inside hid behind some quilts over the windows.

[152] Q. All right, sir. What happened after—where was Mr. Savage at this time?

A. He was standing back of the truck next to me.

Q. Okay. And the other individual had been driving the other two individuals that were in the Pontiac? Where were they?

A. They were back up where they were stopped at.

Q. Was anyone with them?

A. The Myrtle Beach Police Department, I believe.

Q. All right, sir. What happened next after Mr. Cooke had opened the truck?

A. He had looked at the papers to the truck to see who it belonged to. And then after he opened the truck and found the bales, he placed Mr. Savage under arrest.

Q. All right, sir. When you say he looked at the papers, what papers are you referring to?

[153] A. The bill of sale from the Ford Company.

Q. All right, sir. And this was the document that you testified Mr. Savage produced for you when you requested the driver's license and identification?

A. Yes, sir.

Q. All right, sir. After Mr. Cooke was shown the bill of sale, what happened next?

A. After he had placed Mr. Savage under arrest, handcuffed him and placed him in my car and Mr. Cooke went back up to where the Pontiac was at.

Q. Okay.

A. And Mr. Savage and myself sat in the patrol car waiting for everybody to get back down there and I told him not to let anybody mess with the truck.

Q. Okay. And how long a wait was it between the time Mr. Cooke left you with Mr. Savage and he ultimately returned with the other individuals?

A. Probably about ten, fifteen minutes.

Q. Okay. Did anything happen while you were seated there in the [154] car?

A. Mr. Savage and myself were talking and then he wanted to talk with me. He said off the record. I asked him what about and he said about letting him go.

Q. Okay.

A. And he told me to take the handcuffs off and let him hit the beach and run, that the owner of the truck would send me thirty thousand dollars through the mail. All I would have to do is check my mailbox.

[161] * * * * *

Q. You pulled this blue pickup truck over and you got out with your gun out, is that right?

[162] A. Yes.

Q. And you ordered the driver to get out of the car, out of his truck, isn't that so?

A. Yes.

Q. Did you spreadeagle him against the side of the truck to search him?

A. I believe I did.

Q. You asked him to take this position, didn't you, with his hands and feet spread, leaning against the side of the truck?

A. Yes, sir, I think so.

Q. Then you patted him down?

A. Yes.

Q. Nobody had said to you that that man might be armed, had they?

A. No, sir.

Q. Nobody indicated to you he might be armed, had they?

A. No, sir.

Q. You don't [163] ordinarily pull your gun on people when you're stopping them, when you're working traffic, do you?

A. Occasionally.

Q. When you have reason to think they might be armed?

A. You never know.

Q. Why is it that sometimes you do and sometimes you don't?

A. Circumstances surrounding the stop.

Q. If you think they might be armed you pull them out with your gun out?

A. Yes.

Q. But ordinarily you don't do that, isn't that so?

A. That's so.

Q. You made him give you his driver's license and the bill of sale for the truck, is that right?

A. Yes.

Q. Where was the bill of sale for the truck?

A. I believe it was in the truck.

Q. He had to go [164] get that out of the glove box, didn't he?

A. Yes.

Q. Did you get it or did he?

A. I don't remember.

Q. Your job was to hold him there until Cooke had finished with the Pontiac and got down there where you were, right?

A. Yes.

Q. In fact that's what you told him you said, the D.E.A. man back there with the Pontiac, he's going to be here in a minute and I have to hold you until he gets here, is that what you told him?

A. Yes.

Q. Isn't that right?

A. Probably did.

Q. And after a while he began to ask you if he could leave, isn't that so?

A. Yes.

Q. And that's when you told him that you also had a couple of [165] traffic charges you could hold him on if you had to, didn't you?

A. Yes.

Q. You had his driver's license, isn't that so?

A. I did.

Q. He asked for it back and you put it in your pocket, isn't that so?

A. Yes, sir.

Q. He was not free to leave, was he?

A. No, sir.

Q. He was not under arrest, was he?

A. He was under custodial arrest.

Q. He was in your custody, but you hadn't charged him with anything?

A. Yes. I had not charged him, that's correct.

Q. So your primary reason for pulling Mr. Savage over was because you were asked to help Mr. Luther Cooke, isn't that right?

[166] A. Yes, sir.

Q. You were there helping him out with the traffic thing and it was a way to keep him there if you had to?

A. Yes.

[172] * * * * *

Q. Okay. Let's go back to the time, I want you to go back and focus in your mind, you're there at the side of the road; you have Mr. Savage in custodial, whatever that is, and Mr. Cooke has not yet arrived yet; are you with me in point of time? You told Savage you're holding him for Cooke and that if he tries to leave you will arrest him on some traffic charges, is that right?

A. Yes.

* * * * *

Decision of The District Court On Motions To Suppress

[221] * * * * *

THE COURT: I don't think under the facts of this particular situation the time element was so great that it vio-

lated the Dunaway (phonetic spelling) or Brown or Terry [222] standard. I think as of this time the Government has proved by the greater weight of the evidence that the stop was based on reasonable and articulable factors, if that's the word; and in view of the cases that we've discussed, I think the time they were held pending the examination of the pickup was not unreasonable under the facts of this particular case as limited as was necessary and I think the search based on the manner in which he smelled the marijuana created a probable cause and once he had probable cause, then they have the right to go into the truck and to hold the Defendants; so I'm going to overrule your motion at this time.

Decision of District Court On Renewal Of Motion To Suppress—August 1, 1979

[151] * * * * *

THE COURT: I think in Conway (phonetic spelling) against New York at page 9 Justice White, and it's a concurring opinion, says there is nothing in the constitution which prevents a policeman from addressing questions to anyone in the streets. Absent special circumstances, the person approached [152] may not be detained or tricked, but may refuse to cooperate and go on his way. However, given the proper circumstances such as those in this case, it seems to me a person may be briefly detained against his will while pertinent questions are directed to him. And that is let me see your driver's license and registration. Of course, a person stopped is not obliged to answer. Answers may not be complied with and failure to answer doesn't have a basis of the rest but it alerts the officer for continued observation. I think under Terry and under the law generally, assuming the stop was proper, that he had the right to ask for identification and for the evidence of ownership of the vehicle, I think that's a minimum intrusion in lieu of the ownership card, of a registration card. He gave him the bill of sale which was all he had. I don't find anything constitutionally impermissible about that, nor do I find anything constitutionally impermissible about getting the driver's license from Mr. Sharpe, Pavlovich (phonetic

spelling) or whatever driver's license they had. I don't think either of those acts constitutes anything impermissible. While there have been a lot of [153] novel questions in this case without a doubt, maybe it shouldn't give me concern, maybe the Government has failed completely to make out its burden or maybe they've made it out without any question and possibly I've considered it a close question, but I don't mind and I don't find, and the Fourth Circuit may reverse this on ten grounds, but I'm not, let's say, uncomfortable. That's not a good word. I'm always concerned when I have somebody's rights involved, so I wouldn't say I'm unconcerned, but the one problem that seems to envelope all of the others and shadow all of the others with me is the question of the stopping in the beginning. I think that's a real close question in the case. Anyway, the way I look at it, I've given it quite a bit of thought. There is certainly no one of the factors upon which the agent relied that would warrant stopping the vehicle; but as I look upon it all, I believe that putting all of the factors that Agent Cooke had in one hand and lumping them together, that the Government has made a case by the greater weight of the evidence to sustain the burden; and for the reasons that I've gone over with you [154] yesterday, there is no use for me to repeat them again, nothing that has occurred since yesterday on that issue has changed my mind or has caused me to change my mind.

Supreme Court of the United States

No. 83-529

UNITED STATES, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

ORDER ALLOWING CERTIORARI. Filed *June 18, 1984.*

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

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ALEXANDER L. STEVA
CLERK

No. 83-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM HARRIS SHARPE and DONALD DAVIS SAVAGE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE OF THE JUDGMENTS BELOW

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QUESTIONS PRESENTED

I.

Whether the Fourth Circuit was correct in holding that the length of the detentions of Sharpe and Savage effectively transformed them into *de facto* arrests, without basis or probable cause, making the detentions unreasonable seizures under the Fourth Amendment?

II.

Whether the Fourth Circuit correctly held that evidence seized as a result of the unlawful detention properly was suppressed as to Sharpe?

III.

Whether this Court should consider the case, since Sharpe and Savage are fugitives and reversal of the Court of Appeals would not end the litigation?

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IN THE

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OCTOBER TERM, 1984

No. 83-529

UNITED STATES OF AMERICA,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE OF THE JUDGMENTS BELOW

This Brief supports oral argument to be presented during this term.

STATEMENT OF THE CASE

Following a bench trial in the United States District Court for the District of South Carolina, Sharpe and Savage were convicted of possession of marijuana

with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). In a 2-1 decision, the Court of Appeals reversed their convictions.

1. The evidence showed that on June 9, 1978, DEA Agent Luther Cooke was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina. This area had been under surveillance by law enforcement authorities for suspected drug trafficking. (Tr. 35-36, J.A. 10) At approximately 6:30 A.M., Cooke observed a blue pick-up truck with an attached camper shell traveling in tandem with a blue Pontiac. Observing that the truck was riding low in the rear and that a quilted material covered the rear window of the camper, Cooke proceeded to follow the vehicles south. (J.A. 11) After approximately 20 miles, Cooke determined that he would stop the vehicles. He dispatched a request for aid, to which South Carolina Highway Patrolman Thrasher responded. (J.A. 14)

Some time after Thrasher joined the procession, the Pontiac and the truck turned into a loop road through a campground. At no time prior to the turn had the occupants of the truck or vehicles signaled to or communicated with each other, and they did not attempt to do so as they drove the loop road through the campground. The officers testified that the truck and Pontiac were traveling between 55 and 60 miles per hour, although the posted speed through the campground was 35 miles per hour. (J.A. 16, 35) At the end of the loop, the vehicles turned back onto the main coastal highway and again proceeded south toward Myrtle Beach.

Shortly thereafter, Cooke stopped the Pontiac and Thrasher stopped the truck one half mile down the road. Cooke approached the Pontiac's occupants and identified himself. He requested and received an operator's license from the driver, Sharpe. The license was in the name of Raymond J. Pavlovich. (J.A. 17-18) Sharpe and his passenger (against whom the charges were later dropped) were not told why they had been stopped. Several minutes later, Cooke radioed the local police for assistance. Two officers from the Myrtle Beach Police Department eventually arrived, in uniform and armed. (J.A. 18, 27-28) Asking the local police to "maintain the situation", Cooke turned over custody of Sharpe and the passenger to them. Cooke left to join Thrasher, who was with the truck a few blocks further south.

After stopping the truck, Thrasher had approached it with his revolver drawn. He had ordered the driver to get out of the truck and to assume a "spread-eagled" position against its side. Thrasher searched him. At Thrasher's request, the driver produced a Florida license identifying him as William Savage and a bill of sale for the truck in the name of Pavlovich. Thrasher gave Savage no reason for the stop, but indicated that he would hold him there until Cooke arrived. Savage then requested the return of his license and permission to leave. Thrasher refused to return the license, and pocketed it. He told Savage that he was not free to leave as he was under custodial arrest, and that he could detain Savage on speeding charges if necessary. (J.A. 37-39, 42-43) The traffic "charges" were merely a pretext to hold Savage until the arrival of Cooke. (Tr. 166, 172; J.A. 43)

When Cooke arrived appoximately 15 minutes after the truck had been stopped, he identified himself as a DEA agent, and Thrasher handed him Savage's license and the bill of sale. Cooke twice requested that he be allowed to search the camper. Savage refused permission both times. (J.A. 30) Cooke then stepped onto the rear bumper and observed that it did not lower appreciably. He leaned against the rear of the camper, breathed deeply, and announced that he detected the smell of marijuana. Cooke removed the keys from the ignition, unlocked the camper and searched it. He found a number of highly compressed, well wrapped burlap bales, but no marijuana residue.

After the search of the camper, Cooke placed Savage under arrest and left him in Thrasher's custody while he returned to the Pontiac. There, he placed Sharpe under arrest. By the time Sharpe was arrested, approximately 30 to 40 minutes had elapsed since Cooke had stopped the Pontiac. (J.A. 33)

Cooke then assembled the various parties and vehicles and led them to the Myrtle Beach Police Station. That evening the truck was driven to the Federal Building in Charleston, and two or three days later, Cooke supervised the unloading of the truck, which contained 43 intact bales. Eight randomly selected bales were then searched, and analysis of samples taken from them revealed that the bales contained marijuana. No search warrant was obtained prior to the unloading and analyzing of the bales and their contents. Cooke retained two of the eight bales and stored them in a vault in his office. The rest were destroyed by fire, under the direction of the Assistant United States Attorney and without

permission of the District Court. (Tr. 221-222, 151-154)

2. On appeal, a panel of the Fourth Circuit Court of Appeals reversed Respondents' conviction in a 2-1 decision. (Pet. App. B, 14a-51a) The Circuit Court interpreted this Court's cases concerning investigatory field stops of vehicles to require a reasonable suspicion by the officer of illegality, supported by articulable and objective facts, and that the stop must be brief. (Pet. App. B, at 18a-19a) The Court assumed "without deciding that Cooke had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marijuana trafficking" when the officers stopped the vehicles that Respondents were driving. *Id.* at 19a.

However, the Court concluded that the stops failed to meet the requirement of brevity. (*Id.*) The Court noted that it was the transitory nature of the stop that justified the elimination of the probable cause requirement for investigatory stops. It recognized that when this Court transposed the stop and frisk rationale of *Terry* v. *Ohio,* 392 U.S. 1 (1968), to the vehicle stop situation, this Court "was careful to emphasize the *de minimus* nature of such stops in justifying the intrusion under the Fourth Amendment". (Pet. App. B, at 19a) Thus, the Court found that Sharpe was detained without probable cause for arrest for 30 to 40 minutes before Cooke returned to the Pontiac to arrest him. Likewise, Savage was held under custodial arrest without probable cause by Thrasher for at least 15 minutes, while being questioned, and before formally arrested by Cooke. "Indeed, the length of the detentions effectively trans-

formed them into *de facto* arrests without basis and probable cause," thereby converting the stops into unreasonable seizures under the Fourth Amendment. (Pet. App. B, at 20a)

Then, obtaining guidance from *Dunaway* v. *New York*, 442 U.S. 201 (1979), the Appeals Court found that the detentions of Sharpe and Savage were like the detention in *Dunaway*. It found the lengthy detentions of Respondents by law enforcement officers, who had no intention of allowing Respondents to leave custody, closely resembled traditional arrests. Therefore, since probable cause did not exist prior to the detentions (nor until the truck was opened and the bales discovered), the Court viewed the detentions as illegal seizures under the Fourth and Fourteenth Amendments. (Pet. App. B, at 20a-21a)

Having determined that Sharpe and Savage were illegally detained, the Court inquired into whether the bales of marijuana that Cooke discovered during the search of the truck should have been suppressed as fruits of the illegality under *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The Court inquired, pursuant to a proper *Wong Sun* "fruits" analysis, "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged as the primary taint" (citing *Wong Sun* at 488). The Court then held that the officer would not have had the opportunity to smell the raw marijuana, and thus, would have had no reason to search the truck, had Savage not been detained for

longer than constitutionally permissible under an investigatory stop. (Pet. App. B, at 22a)

The Court also rejected Petitioner's argument that Cooke's olfactory find supplied the probable cause, holding that his smelling of the marijuana was so intertwined with the circumstances of the unlawful detentions, that it could not have purged the illegal taint of those detentions, and therefore, could not have served as probable cause for a search. (*Id.*)

As an alternative ground for mandating suppression of the fruits of the unlawful detention, the Court of Appeals held that the officers' warrantless search of the burlap wrapped marijuana bales discovered in the pick-up truck violated the Fourth Amendment. (Pet. App. B, 23a-25a) The Court concluded that under the analysis in *Robbins* v. *California*, 453 U.S. 420 (1981), the warrantless search of the bales was impermissible.

Because of the resolution of the issues on appeal, the Court did not address the questions of (1) whether the District Court properly refused to suppress Sharpe's license and the bill of sale for the truck; (2) whether or not Agent Cooke had a reasonable and articulable suspicion to stop the vehicles; and (3) whether the marijuana was subject to suppression on the alternative ground that Respondents suffered prejudice from the destruction of the marijuana without notice to them. (Pet. App. B, at 22a and 25a)

Circuit Judge Russell dissented, stating that a balancing test was necessary in order to examine the reasonableness of the search and seizure. He also

would have found that the intrusion in this case was minimal and that the delay was occasioned by the Respondents themselves. (Pet. App. B, 26a-51a)

3. After rehearing *en banc* was denied by an equally divided court (See no. 81-1736, Pet. App. 39a-40a), the United States petitioned for certiorari in this Court. The questions presented were: (1) Whether law enforcement officers may detain an individual suspected of criminal activity for a limited but more than momentary period in order to pursue the investigation; (2) Whether the marijuana seized from the vehicle was suppressible as a fruit of the detention; and (3) Whether the Constitution required a warrant prior to the searching of the burlap bales in the back of the truck. This Court granted certiorari on June 21, 1982, vacated the judgment of the Fourth Circuit, and remanded the case to the Fourth Circuit for further consideration in light of *United States* v. *Ross,* 456 U.S. 798 (1982). *United States* v. *Sharpe,* 457 U.S. 1127 (1982). Justice Stevens, joined by Justices Brennan and Marshall, dissented because *United States* v. *Ross* shed no light on the proper disposition of whether the warrantless search itself was legitimate. 457 U.S. at 1128.

On remand, the Court of Appeals again reversed the convictions 2-1. (Pet. App. A, 1a-13a) The majority concluded that by virtue of *Ross,* the alternative basis for the previous decision was no longer valid. (Pet. App. A, at 2a) However, the majority found that *Ross* did not adversely affect the primary holding, that the initial stop of the vehicles and the lengthy detention of the Respondents constituted illegal seizures. The majority therefore, readopted the

original majority opinion as modified, and again reversed the convictions. (*Id.* at 2a-3a)

Judge Russell again dissented, concluding that this Court's remand required consideration of both alternative grounds of decision. He argued that the decision of the majority was inconsistent with *Michigan* v. *Summers,* 452 U.S. 692 (1981), and failed to take into account Respondents' responsibility for the length of the detention. (Pet. App. A, 8a-9a)

Prior to the entry of the Court of Appeals' judgment on remand, the opinions were circulated to the full court. Suggestion for *sua sponte en banc* reconsideration was made by a member of the Court but failed to garner the necessary majority vote. However, the opinions on remand reflect a full court vote of 5-4 to affirm the panel opinion. (Pet. App. A, 3a, 4a, 13a)

The judgments of the Court of Appeals (Pet. App. C, 52a and 53a) on remand from this Court were entered on June 30, 1983. On August 22, 1983, Justice Brennan extended the time in which the United States could file a petition for a writ of certiorari up to and including September 28, 1983. Respondents were served with a copy of the petition on October 10, 1983. On November 9, 1983, Respondents filed a letter brief in opposition to the petition with the Clerk of this Court. On November 21, 1983, Respondents were directed to file a formal response by December 21, 1983. On December 21, 1983, Respondents filed their brief in opposition to the petition for a writ of certiorari.

The petition was granted on June 18, 1984. The brief on the merits of the United States was filed on August 2, 1984. On August 27, 1984, counsel for Respondents notified the Court that Respondents were fugitives, as of an Order of the District Court of July 11, 1984. Counsel sought permission to proceed *in forma pauperis*. On August 30, 1984, Respondents' counsel sought an extension of time to file Respondents' brief, due to the pendency of the *in forma pauperis* motion. The extension of time was granted September 5, 1984, permitting counsel up to and including October 1, 1984, within which to file a brief pursuant to Supreme Court Rule 39. On October 1, 1984, this Court denied the motion to proceed *in forma pauperis* and directed that counsel serve as amicus curiae to the decision below.

SUMMARY OF ARGUMENT

The Fourth Circuit's opinion should be affirmed. The Court did not hold that, absent probable cause, investigatory stops which are more than momentary are *pre se* unreasonable under the Fourth Amendment. Rather, the Court held that the lengthy detentions of Sharpe and Savage by law enforcement officers, who had no intention of allowing them to leave custody, closely resembled traditional arrests which require probable cause. The Court below carefully considered the facts of the case and correctly applied the facts to the current Supreme Court law.

This Court recently and forthrightly has spoken on the issue of investigatory stops. When probable cause is lacking, the police may not seek to verify their suspicions by means that approach the condi-

tions of arrest. The investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Further, the methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. Although this Court has recognized the reasonableness of seizures longer than momentary ones, the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on only reasonable suspicion. Analysis of this Court's precedents limiting investigatory stops to brief limited inquiries, and comparison of those authorities with the lengthy detentions in this case, mandates the conclusion that the officers here overstepped the lawful bounds of limited investigatory stops.

Moreover, the court below correctly applied the exclusionary rule to both Respondents. The evidence obtained following the unlawful lengthy detentions flowed causally from the Fourth Amendment violations.

Finally, the Court of Appeals merely assumed, without deciding, that the officers had a reasonable and articulable suspicion justifying the initial stop of respondents. In addition, the Court of Appeals did not consider whether the trial court erred in denying Respondents' motion to dismiss the indictment due to the destruction of the marijuana in the absence of notification to defense counsel and in the absence of a court order. Thus, reversal of the Court of Appeals will not result in the reinstatement of

Respondents' convictions, but merely a remand for determination of the unreached questions. These remaining questions make it unnecessary for the Court to address the broad constitutional questions here.

ARGUMENT

I. The Court of Appeals Was Correct in Concluding That Duration of the Detentions Effectively Transformed Them Into *De Facto* Arrests Without Basis in Probable Cause, Thereby Making Them Unreasonable Seizures Under the Fourth Amendment.

A. The issue presented here is whether the investigatory stop made pursuant to *Terry* v. *Ohio*, 392 U.S. 1 (1968), was converted into an unlawful arrest by its duration and the subsequent actions of the officers.

The Constitution does not forbid all searches and seizures. Only those that are unreasonable are not permitted. *Rios* v. *United States*, 364 U.S. 253 (1960). *Terry* held that "whenever a police officer accosts an individual, and restrains his freedom to walk away, he has 'seized' that person." *Terry* v. *Ohio*, *supra*, 392 U.S. at 16. Not all *Terry* seizures are unreasonable, but may become so based on the duration of the detention.

The length of the detentions of the Respondents transformed them into *de facto* arrests without basis in probable cause. An essential element of a *Terry*-type stop is its brevity. It was described in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975) as "a brief stop"; in *Adams* v. *Williams*, 407 U.S. 143, 146 (1972) as "a brief stop of a suspicious individual . . . to maintain the status quo momen-

tarily . . ."; and "confined strictly to what was minimally necessary." *Terry* v. *Ohio, supra,* at 30.

A composite picture of a *Terry* stop is that it is brief, limited to the time that is minimally necessary to investigate the circumstances invoking suspicion; limited in scope to identification (such as the licensing status of a driver or registration of a vehicle); allowing perhaps a protective "pat down" of the outer surface of the suspect's clothing for weapons if the officer has reasonable apprehension that the person is armed or dangerous, and limited questioning reasonably related to the circumstances that justified the initiation of the momentary stop. See *United States* v. *Brignoni-Ponce, supra; Terry* v. *Ohio, supra; Warden* v. *Hayden,* 387 U.S. 294, 310 (1967).

In *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975), this Court held that the Fourth Amendment was violated when a roving Border Patrol stopped a vehicle near the Mexican border to question the occupants about their citizenship and immigration status, merely because the occupants appeared to be of Mexican descent. The Court stated:

> The stop and inquiry must be reasonably related in scope to the justification for their initiation, and thus the officer may question a driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause . . .*

Id. at 881-82. (Emphasis supplied)

Thus, after a "brief stop", and absent additional corroborative evidence of alleged criminality, the authorized "momentary detention" is transformed into "unauthorized" detention by reason of the intolerable intensity of the investigative seizure. This transformation point can be determined only by viewing the totality of the surrounding circumstances in each individual case. See *Terry, supra* at 21.

In the instant case, the Pontiac was stopped by Agent Cooke. Cooke requested and received driver's licenses from both Sharpe and his passenger. Sharpe handed him a Georgia driver's license in the name of Raymond J. Pavlovich. Although the driver and the passenger were detained, Cooke did not state why he had stopped them and did not ask them to explain their conduct. (Tr. 91) Cooke finally instructed Sharpe and the passenger to get out of the car. (J.A. 18) Cooke contacted Thrasher on his car radio and was advised that Thrasher had stopped the camper one-half mile ahead. Cooke then contacted the North Myrtle Beach Police Department. At about 7:20 A.M. a unit arrived at the Cooke/Thrasher location. Cooke left Sharpe and the passenger in the custody of the armed uniformed policemen, while he proceeded ahead to the camper. (J.A. 18-19) Eventually, Cooke returned to the Pontiac and advised Sharpe and the passenger that they were under arrest for conspiracy to possess and distribute marijuana. Thirty-five to forty minutes had elapsed since the stop of the Pontiac when Cooke advised the two men that they were under arrest. (J.A. 21)

While every arrest includes a detention, not every detention includes an arrest. See *Terry, Adams* and

Brignoni-Ponce. However, where the detention exceeded 35 minutes, it is mere sophistory to say that the stop was "brief" or constituted only a "momentary detention". Nor, did the detention of Sharpe involve only a minimum intrusion. *Terry* authorizes only an "intrusion short of arrest" recognizing even there that that is "a serious intrusion upon the sanctity of the person . . . and is not to be undertaken lightly". *Terry* v. *Ohio, supra,* 392 U.S. at 17.

Cooke admitted that the stop was based on the appearance of the pick-up truck and was a "profile" stop. (J.A. 33) Officer Thrasher testified that he knew in his mind that the truck they were following contained marijuana. (Tr. 161) However, once the stop was made, Sharpe was not questioned about these suspicions, but yet was not free to go on his way. He was placed in a police car, his license had been seized, and he was detained by armed officers for approximately forty minutes. ———

As to Savage, the situation is similar. Thrasher stopped the truck about half a mile down the road from the Pontiac. Thrasher got out of his car with his revolver drawn. Savage was ordered out of the truck, and was told to put his hands up. (J.A. 41-42) Thrasher requested a driver's license and vehicle registration or papers for the camper. He produced a Florida driver's license in his name and a bill of sale for the vehicle in the name of Pavlovich. Thrasher advised Savage that Cooke, a DEA agent, had stopped the Pontiac and would be joining them in a few minutes, and that he was going to hold Savage until Cooke got there. Savage then asked Thrasher to return his driver's license and for per-

mission to leave (J.A. 43), to which Thrasher replied that he had traffic charges he could hold him on if he had to. (*Id.*)

When Cooke finally arrived at the truck, Thrasher handed him Savage's driver's license and the Pavlovich bill of sale. This bill of sale was meaningless but for the stop of the Pontiac. Cooke then asked Savage if he could look inside the truck to which Savage replied "no". Cooke asked Savage a number of questions about the truck ownership and where he was going. Cooke then jumped on the bumper of the truck. He again asked if he could look inside the truck and Savage responded "no". Cooke then smelled around the windows of the camper. He then took the keys from the ignition and opened the back gate of the camper.

The United States concedes that probable cause to arrest the Respondents for drug offenses did not arise prior to Cooke's discovery of the marijuana. (Brief of the United States, at 15) Nonetheless, it is clear that prior to that time, Savage had been placed under *de facto* arrest. Thrasher asked him to get out of the car at gunpoint. He "spread eagled" him on the camper. Savage was to be held, even upon the pretext of a traffic charge, until the arrival of Cooke. As noted above, it is beyond peradventure that Sharpe, detained for forty minutes in the custody of Cooke and then the local police, was arrested prior to the existence of probable cause and formal arrest.

B. Contrary to Petitioner's contention, the Court of Appeals did not hold that absent probable cause, investigatory stops that are more than momentary

are *per se* unreasonable under the Fourth Amendment, without regard to the facts or circumstances that affect the duration of the detention.

Rather, the Court held that the lengthy detentions of Sharpe and Savage by law enforcement officers, who had no intention of allowing them to leave custody, closely resembled traditional arrests. Since these detentions were not grounded on probable cause, they were unconstitutional seizures. Review of the opinions below establish not a *per se* rule, but that the thirty to forty minute *"de facto"* arrest of Sharpe and the fifteen to twenty minutes *"de facto"* arrest of Savage, both without probable cause, transformed them into "traditional arrests", which require probable cause. (Pet. App. B; *Sharpe* v. *United States,* 660 F.2d 967, 970 (4th Cir. 1981)).

The Court of Appeals decision was based in part on the construction of this Court's opinion in *Dunaway* v. *New York,* 442 U.S. 200 (1979). There, this Court carefully analyzed the distinction between the seizure of a person for purposes of arrest, which requires probable cause, and the more limited seizure of a person by a brief investigatory stop, which requires merely reasonable suspicion. The Court rejected the suggestion of a multi-factor balancing test of "reasonable police conduct under the circumstances, which Petitioner urges upon the Court." *Dunaway* emphasized that the *Terry* stop was a narrow exception and was not to be extended so as to erode the long prevailing standards of probable cause:

> A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and

> individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers and our consequent reluctance to depart from the proven protections afforded by the general rule, is reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balance" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Dunaway v. *New York*, 99 S.Ct. at 2257.

Additionally, the *Dunaway* Court stressed that a lesser standard than probable cause was not to be applied merely because the seizure occurred during an investigative stage rather than an accusatory stage. As the Court has previously held in *Davis* v. *Mississippi*, 394 U.S. 721, 726-27 (1969):

> [T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject a limited number of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions".

Thus, although the court below did not issue a *per se* rule concerning the length of any investigatory stop, it concluded that the detentions of Sharpe and Savage violated the "brevity" prong of this Court's cases concerning seizures based on less than

probable cause. Its conclusion was perfectly consistent with this Court's precedents. See *United States* v. *Cortez*, 449 U.S. 411 (1981) (the Fourth Amendment applies to seizures of the person, including *brief, investigatory stops* such as the stop of the vehicle here); *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980); *United States* v. *Brignoni-Ponce*, 422 U.S. 873-878 (1975); *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Terry* v. *Ohio*, 392 U.S. 1, 16-19 (1968) (Emphasis supplied)

Recently, in *United States* v. *Place*, —— U.S. ——, 103 S.Ct. 2637 (1983), this Court held that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage *briefly*, and to investigate the circumstances that aroused suspicion, provided, that the investigative detention is properly limited in scope. Thus, the Court concluded in *Place* that the length of the detention of the respondent's luggage alone precluded the conclusion that the seizure was reasonable, in the absence of probable cause. The Court held that although reasonableness of seizures longer than the momentary ones in *Terry*, *Adams* v. *Williams*, 407 U.S. 143 (1972), and *Brignoni-Ponce* had been recognized, the brevity of the invasion of the individual's Fourth Amendment interest is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. *United States* v. *Place*, *supra*, 103 S.Ct. at 2645.

Likewise, in *Florida* v. *Royer*, —— U.S. ——, 103 S.Ct. 1319 (1983), this Court held that *Terry* and

its progeny created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be investigative, yet violative of the Fourth Amendment absent probable cause. In the name of investigation, a person who is no more than suspected of criminal activity cannot be subjected to a full search of his person or of his automobile or other effects. "Nor may the police seek to verify their suspicions by means that approach the conditons of arrest." *Florida* v. *Royer, supra,* 103 S.Ct. at 1325.

Moreover, the *Royer* Court concluded that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative method employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.*

This Court's prior analysis demonstrates that law enforcement officers making valid *Terry* stops lawfully may detain a subject for more than a brief moment, if such action is reasonably required in order to pursue a legitimate avenue of investigation. Here, however, Respondents were detained and not told of the reason of their detention. Sharpe was held in the custody of police officers for forty minutes, prior to being informed of the nature of the investigation and being placed under formal arrest. Savage was held for twenty minutes prior to his "formal" arrest. Before that, Savage had been held on the mere pretext of a traffic offense, and twice refused to consent to the search of the truck. After the second refusal, Agent Cooke unilaterally took the keys from

the ignition and proceeded to open the camper himself. Under the facts of this case, Sharpe's detention for thirty-five to forty minutes and Savage's detention for fifteen to twenty minutes were not reasonable under these circumstances.

In any event, it is clear that the Court below considered the totality of the circumstances which Petitioner urges. See *United States* v. *Cortez, supra,* at 417-418; *Florida* v. *Royer, supra.* The Court did not find the delay attributable to the evasive action taken by Savage, nor did the District Court. (J.A. 44-45) Rather, the lengthy detention was instead due to the officers' conduct: (1) the officers followed Respondents for over 21 miles before deciding to stop the vehicles; (2) the officers were unsuccessful in making radio communication once the vehicles were stopped; (3) it took the Myrtle Beach Police officers over 10 minutes to appear on the scene; (4) although several officers and agents were surrounding each vehicle, not one officer could tell the drivers why they were being detained; (5) there is nothing in the testimony that shows any "ploy" by Savage to evade officers; and (6) the lengthy delay was caused by Agent Cooke's failure to communicate with the several officers assisting him and by all the officers' failure to follow proper procedure.

C. Moreover, *Michigan* v. *Summers,* 452 U.S. 692 (1981), cited by Petitioner in support of its position, is inapposite to the instant case. Factually, *Summers* offers little guidance to this case, since it concerned detention of an occupant of the premises being searched pursuant to a search warrant. Significantly, the *Summers* Court compared the intrusion

upon Summers, as opposed to that intrusion which would obtain a formal arrest. "[O]f prime importance" was the fact that the police had obtained a warrant to search Summers' house for contraband. "A neutral and detached magistrate . . . had authorized a substantial invasion of the privacy of the persons who resided there." 452 U.S. at 701. Moreover, this Court noted that the type of detention imposed upon Summers was not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officer sought normally would be obtained through the search, and not through the detention.

Summers contrasts with the present facts. Respondent Sharpe was pulled over and detained without ever being informed of the nature of the detention or the reason for it. Likewise, Respondent Savage was detained by Officer Thrasher for fifteen to twenty minutes prior to the arrival of Agent Cooke. Upon his arrival, Cooke twice requested that he be allowed to search the camper and was refused both times. It was at that point that Cooke approached the rear of the truck to perform his bumper and olfactory investigations. Thus, the opposite from *Summers* occurred here; the officers used the detentions to gain information to justify the search, rather than the detention merely being incidental to a valid right to search.

In conclusion, *Michigan* v. *Summers* stands for the proposition that, for Fourth Amendment purposes, a search for contraband permitted by warrant and founded on probable cause implicitly carries with it limited authority to detain the occupants of

the premises while a proper search is conducted. 452 U.S. at 705. In fact, the Court rejected the "multi-factor balancing test of 'reasonable police conduct under the circumstances'" to cover all seizures that do not amount to technical arrests, which Petitioner urges upon the Court. The *Summers* Court cited from *Dunaway* v. *New York,* 442 U.S. 200, 213 (1979), where it was noted:

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multi-various circumstances presented by different cases, especially when the balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime."

Since the Court below carefully considered the facts of this case and correctly applied the facts to the current United States Supreme Court law, its decision should be affirmed.

II. The Marijuana Seized From the Pick-up Truck Properly Was Suppressed as a Fruit of the Unlawful Detention of Sharpe.

The court below was correct in its application of the exclusionary rule. Agent Cooke admitted that the stop of Sharpe and Savage was based on the appearance of the pick-up truck and was a profile stop. Thrasher testified that he knew in his mind that the truck they were following contained marijuana.

Once the stop was made, Sharpe was not questioned about the suspicions, but yet was not free to go on his way. He was placed in a police car; his license

had been seized and he was detained for approximately forty minutes. Thus, the court below correctly determined that this was a custodial arrest without probable cause. *See also, United States* v. *Thompson,* 712 F.2d 1356 (11th Cir. 1983).

If illegal detention for an extended period of time without prior probable cause is not deterred by application of the exclusionary rule, then police officers would be judicially licensed to illegally detain suspects, without probable cause, for extended periods of time, until the will of the suspects succumbs to the coercive effect of illegal police detention. Thus, all fruits of the illegal detention, including the Georgia driver's license in the name of Raymond J. Pavlovich (which is the only evidence which connects Sharpe to the Ford truck) and the marijuana, must be suppressed.

Brown v. *Illinois,* 422 U.S. 590 (1975), identified several factors that should be considered in determining whether a confession has been purged by the taint of the illegal arrest: (1) the temporal proximity of the arrest and the confession; (2) presence of intervening circumstances; and (3) particularly, the purpose and flagrancy of the official misconduct. 422 U.S. at 603, 604. See also *Taylor* v. *Alabama,* —— U.S. ——, 102 S.Ct. 2664, 2667 (1982). These factors equally are applicable to this illegal detention/illegal search fact sitution.

Temporally, Sharpe was detained unlawfully while Agent Cooke went about seeking to satisfy his suspicions about the contents of the truck. No intervening circumstances occurred except for the unlawful detention of Respondent Savage. Third, Respondents

were detained for an extended period so that the officers could get a look inside the camper shell of the truck. The delayed detention of Sharpe by Cooke, in tandem with the delayed detention of Savage by Thrasher prior to interrogation by Cooke, served no legitimate need except to increase the likelihood that over the course of time of the detention, the officers would get a look inside the truck. Had the stop of Savage been more than just a mere pretext to see what was in the camper (such as the traffic violation which Thrasher noted), these legitimate concerns could have been expeditiously carried out while Thrasher awaited Cooke's arrival. Instead, Savage was just held. Thus, the discovey of the marijuana, resulting as it did from the delayed detention of Sharpe and Savage, was directly and causally related to both prolonged detentions.

Accordingly, the Court of Appeals was correct in finding that the marijuana was subject to suppression as against Respondent Sharpe.

III. The Court Should Not Consider This Case, as Reversal Will Not Resolve the Litigation.

Reversal of the opinion of the Court of Appeals will not dispose of this case. Other meritorious issues were raised but not reached by the Fourth Circuit because of the reversal of the Respondents' convictions on other grounds. These additional issues include (1) whether the facts known to the police authorities at the time they stopped Respondents were tenuous and did not provide sufficiently articulable suspicion to justify a stop; and (2) whether the Court erred when it denied Respondents' motion to

dismiss the indictment due to the destruction of marijuana by the DEA in the absence of notification to defense counsel and in the absence of a court order. As to the second issue, the Court of Appeals went so far as to say:

> Another ground upon which Sharpe and Savage challenge the admission of the marijuana into evidence was the prejudicial effect of the destruction of the marijuana. Because we conclude that the marijuana should have been suppressed, we do not find it necessary to decide this question. The procedure that the government followed in destroying the evidence—without defense counsel's knowledge and without leave from the District Court—nevertheless seriously concerns us. . . .

(Pet. App. B, 25A, n. 5)

Thus, unlike the Petitioner's contentions and *United States* v. *Villamonte-Marquez,* No. 81-1350 (June 17, 1983), reversal of the Court of Appeals decision would not necessarily reinstate the judgments of conviction and sentences entered by the District Court. At most, the Court could direct that the Court of Appeals opinion be reversed and that the matter be remanded to the Court of Appeals for further consideration of the unreached issues. Thus, this case is in a much different posture than *Villamonte-Marquez* when that case was before the Court. Because other preliminary issues exist, the Court should not proceed to decide the broad constitutional issues presently before it.

CONCLUSION

For all the above and foregoing reasons, the judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

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NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-529

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-529

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The arguments raised in the brief of amicus curiae in support of the judgments below were anticipated and answered in our opening brief and do not require further response. We do believe, however, that the Court may wish to consider the question of the effect, if any, of respondents' fugitive status on the proper disposition of this case, and we therefore address that question herein.

The government's petition for a writ of certiorari in this case was filed on September 27, 1983, and was granted on June 18, 1984. On May 11, 1984, while the petition was pending, counsel for respondents advised the Clerk of this Court by letter that respondent Sharpe had become a fugitive with respect to charges pending in the Northern District of Georgia and the State of North Carolina (Motion to Proceed In Forma Pauperis 1 & Exh. A). Thereafter, on July 11, 1984, the United States District Court for the District of South Carolina entered orders forfeiting the

bonds of both respondents due to their failure to appear before the court for a bond hearing on July 10, 1984 (Motion to Proceed In Forma Pauperis 1 & Exh. B). As of this writing, we are advised by the United States Attorney's office that, to the best of its knowledge, respondents remain fugitives.[1]

At the outset, we note that respondents' fugitive status does not affect this Court's Article III jurisdiction to decide this case. The government, which has sought review of the court of appeals' decision reversing respondents' convictions, clearly has a "live" interest in the outcome of the case. Reversal of the decision below would reinstate the judgments of conviction and sentences entered by the district court and would subject respondents to imprisonment on their convictions. For this reason, respondents, wherever they may be, also retain a legally cognizable interest in the outcome of the case. See *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 1-3 n.2; *Powell* v. *McCormack*, 395 U.S. 486, 496-497 (1969). Indeed, in *Molinaro* v *New Jersey*, 396 U.S. 365, 366 (1970), the Court, while declining to adjudicate an appeal brought by a criminal defendant who had become a fugitive, expressly stated that the defendant's "escape does not strip the case of its character as an adjudicable case or controversy."

The question remains, however, whether respondents' fugitive status should, as a matter of sound judicial discretion, affect the manner in which the Court disposes of this case. As we see it, there are basically three options. First, the

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[1]Our opening brief in this case was filed August 6, 1984. While we were aware at that time that respondent Sharpe had become a fugitive, we did not learn of respondent Savage's fugitive status until advised by letter of August 23, 1984, from opposing counsel. For that reason, the *Molinaro* issue was not addressed in our opening brief.

Court could proceed to decision on the merits of the issues presented, entirely ignoring the fact that respondents are fugitives and are unavailable to suffer the consequences of any judgment adverse to their interests that the Court may render. Second, the Court could vacate the judgment of the court of appeals in respondents' favor and remand for the purpose of dismissing respondents' appeals, without reviewing the merits of the issues on which the government's petition was granted. Finally, the Court could proceed with review on the merits, reversing the judgment of the court of appeals if it is in error and vacating the judgment if it is not. We believe the first option is incompatible with the sound principles underlying the *Molinaro* doctrine and should be rejected. While both the second and third approaches have something to commend them, for the reasons we set forth below we submit that the balance of public interests favors the third course.

In *Molinaro*, the Court dismissed the appeal on the ground that the appellant had become a fugitive. The Court explained (396 U.S. at 366):

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. * * * [S]uch an escape * * * disentitles the defendant to call upon the resources of the Court for determination of his claims.

See also *Eisler* v. *United States*, 338 U.S. 189 (1949); *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Smith* v. *United States*, 94 U.S. 97 (1876). Of course, this case may be distinguished from *Molinaro* because here the party seeking review in this Court is the government, not the escaped defendants. Consideration of the policies that inform *Molinaro* demonstrates, however, that this distinction does not

support a difference with respect to the escaped defendants' loss of entitlement to a ruling by this Court in their favor.

To begin with, although it is true that the case came to this Court on the government's petition for certiorari, it was respondents' appeal of their convictions that set in motion the chain of events that led the government to petition for review of the court of appeals' decision. If respondents had become fugitives during the pendency of their appeals in the court below, there is no question that, under *Molinaro*, the court could and presumably would have exercised its discretion to decline to adjudicate their claims. See *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975); *United States* v. *Shelton*, 508 F.2d 797, 799 (5th Cir.), cert. denied, 423 U.S. 828 (1975) (collecting cases). Respondents should be in no better position merely because they postponed their flight until after the government sought review of the court of appeals' decision in their favor.

Indeed, the rationale for dismissal of an appeal when the appellant is at large is equally applicable to respondents' situation. As the Court explained in *Smith* v. *United States*, 94 U.S. at 97:

> It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.

See *Estelle* v. *Dorrough*, 420 U.S. at 543-544 (Stewart, J., dissenting); *Dawkins* v. *Mitchell*, 437 F.2d 646, 647 (D.C. Cir. 1970).

The guiding principle — equally applicable without regard to the identity of the party that has initiated the proceedings in this Court — is whether the defendant is prepared to submit to the jurisdiction of the courts in the event of an unfavorable disposition of his case. This principle should apply with special force when the issue to be adjudicated does not touch upon the question of the defendant's guilt or innocence, but concerns whether reliable evidence of guilt should be suppressed in order to further the deterrent policies of the exclusionary rule, of which the defendant is an incidental beneficiary. This Court determined in *United States* v. *Havens*, 446 U.S. 620 (1980), and *Walder* v. *United States*, 347 U.S. 62 (1954), that the interest in maintaining the integrity of judicial proceedings against false testimony outweighed the remote and speculative possibility that the use of illegally seized evidence for impeachment would impair the deterrent efficacy of the exclusionary rule. So here, the refusal to allow fugitive criminal defendants to secure relief from a conviction, even if based on illegally seized evidence, protects the integrity of the judicial process with even less conceivable impact on official compliance with the Fourth Amendment.[2] We accordingly urge the Court to hold that respondents in this case have forfeited any right to benefit from the judgment below, even if that judgment is legally correct, by virtue of their flight from justice.

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[2]Manifestly, no officer would be encouraged to undertake a contemplated unlawful search or seizure by the possibility that the fruits thereof might be used if the defendant becomes a fugitive during the pendency of appellate proceedings.

The question remains whether the Court should simply vacate the judgment of the court of appeals and remand with directions to dismiss the appeal[3] or should decide the merits of the substantive Fourth Amendment issues before turning to the question of remedy (which would not arise if this Court were to reverse as to both respondents). If a defendant becomes a fugitive while an appeal of a district court's suppression order is pending before a court of appeals, we believe the proper course would be to vacate the suppression order without passing upon the merits of the appeal. But additional interests must be weighed in the balance once this Court has granted review. When the government seeks review, its interests encompass more than the correction of what it believes to be an erroneous disposition of the particular case. The decision to petition for certiorari also reflects, in most instances, a determination that authoritative disposition of the legal questions decided by the court of appeals is important to the development and administration of the law and to the conduct of the government's operations. And, of course, the action of this Court in granting plenary review upon the government's petition tends to reflect its concurrence in the conclusion that the issues presented call for authoritative disposition.

Accordingly, we submit that the appropriate course would be for the Court to proceed to decide the questions presented. If the Court were to disagree with the decision of the court of appeals, it should reverse the judgment of that court. If, on the other hand, the Court were to agree with the

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[3]If this Court were to vacate the judgment of the court of appeals without deciding the substantive issues on which it may grant review, we believe it should not be open to the court of appeals thereafter to reinstate its judgment in the event respondents are subsequently apprehended or surrender themselves. Such a course would enable respondents to profit from their flight and would prejudice the rights of the government.

lower court's decision, it should not affirm the judgment below. Instead, it should vacate the judgment of the court of appeals and remand the case to that court with directions to dismiss the appeals with prejudice.

The course we propose, which this Court is empowered by 28 U.S.C. 2106 to adopt, would not require the Court to render an advisory opinion. As demonstrated above, the case itself presents a live controversy, which Article III empowers this Court to adjudicate. Moreover, as the Court observed in *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 25, "courts have considerable discretion in conforming their decision-making processes to the exigencies of particular cases." Here, the Court should reach the merits because "resolution of [the] Fourth Amendment question is necessary to guide future action by law enforcement officers" (*ibid.*). At the same time, however, respondents, who have removed themselves from the custody and control of the courts, are not entitled to any favorable relief from this Court, regardless of its ruling on the merits.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1984

DOJ-1984-11